Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

PATRICK BRADY and SHAWN MURPHY,

Petitioners,

v.

STEVERSON DAVIS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment's Due Process Clause imposes upon city police officers who arrest a man for destruction of property belonging to a homeless shelter and then transport him to another location, a duty to protect that person from injury by third persons after the officers have released the man from custody, where the reason for releasing the man from custody at another location was that the county jail would not accept him because it was overcrowded, and the arrested person stated that if released at the jail he would return to the homeless shelter and destroy more of its property?

2. Whether the Court Below erred when it evaluated the question whether a claim had been stated under 42 U.S.C. 1983 for violation of the Fourteenth Amendment's substantive Due Process guarantees using a "deliberate indifference" standard, rather than the "shocks the conscious" standard which this Court established in *County of Sacramento v. Lewis*, (May 28, 1998), where the claim is made against police officers who arrested an intoxicated man for property destruction and then released him on the side of a road because the jail was overcrowded and could not accept the man, and, where after the man's release, he was struck and injured by a car driven by a third person?

[Note: Petitioner reserves the right to argue Question 3 in the event certiorari is granted on the above questions, but does not include Question 3 among the reasons for the grant of certiorari.]

QUESTIONS PRESENTED – Continued

3. Whether the courts below erred in denying police officers claims for qualified immunity in a case under 42 U.S.C. 1983 alleging a substantive Due Process violation, when the courts below held that in November 1994 police officers had a clearly established Constitutional obligation not to do anything to increase the danger of an intoxicated person to injury from third persons when they move him to another location to prevent the commission of a crime and release him from custody there?

LIST OF PARTIES

The parties of the proceedings below were the petitioner Steverson Davis and the respondents Flint, Michigan police officers Patrick Brady and Shawn Murphy.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners City of Flint, Michigan police officers Patrick Brady and Shawn Murphy respectfully request that this Court issue a Writ of Certiorari to review the Judgment and Opinion of the Sixth Circuit entered on May 8, 1998.

OPINION BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported as *Davis v. Brady*, 143 F.3d 1021 (6th Cir. 1998), Appendix, at 1a-13a. The Court of Appeals denied the Petition for Rehearing and Suggestion for Rehearing En Banc on June 29, 1998. Appendix, at 23a.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 8, 1997. Appendix, at 1a-13a. On June 29, 1998, the Court of Appeals denied a timely Petition for Rehearing. Appendix, at 23a. Pursuant to Supreme Court Rule 13.1 and 13.3, this Petition has been filed within ninety days of the denial of rehearing.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution Amendment 14 Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

November 17, 1994. Flint, Michigan. Thanksgiving. Respondent Steverson Davis was drinking. He had stolen a bottle of Thunderbird wine from a Rite Aid drugstore, drank it, and when it was gone, went back to the Rite Aid and stole another bottle of Thunderbird. When that was gone, he headed back toward the Rite Aid, but before he got there he met another man who had vodka and they sat around and drank a pint before both walked to the Carriage House Mission, a homeless shelter, for a meal. Deposition of Steverson Davis (hereafter SD), at 31-36. Davis, who had been staying at the mission for three weeks acknowledged that when he drinks he gets "a little bit nasty." SD, at 20, 40.

At 6:38 PM, Petitioners Flint, Michigan police officers Shawn Murphy and Patrick Brady received a radio run notifying them of "trouble with a man" at the mission. Arriving at the mission, Officers Murphy and Brady found Steverson Davis outside the mission shouting abusively at John Prout. Deposition of Shawn Davis (hereafter SM), at 31. Mr. Prout, the manager of the mission, told Officer Brady that Davis had been staying at the mission, but when Davis arrived around dinner time that evening, he had refused to admit Davis because he had been drinking. Mr. Prout had offered to provide Mr. Davis a meal in a separate room at the mission, but Davis became enraged, punched out several windows inside the mission, and then went outside and began breaking the mission's large windows by throwing rocks through them. Mr. Prout told Officer Brady that he wanted to

press charges against Davis and that he never wanted Steverson Davis on the mission property again. Deposition of Patrick Brady (hereafter PB), at 32.

Davis admitted that he had broken the mission's windows and said that he would do it again. SM, at 32. Davis was very abusive toward Mr. Prout, told Officer Murphy that Prout had no right to kick him out of the mission and vowed "to beat that motherfucker's ass." SM, at 31. While angrily shouting at Mr. Prout that he knew karate, Davis made several karate kicks and punches in the air directed toward Mr. Prout. When Davis' anger "just kept escalating," and he began "hand thrust pointing" and yelling abusively at Mr. Prout, Officer Murphy stepped between them and placed Mr. Davis under arrest. SM, at 33-37.

Davis did not resist the arrest, but continued to yell very loudly at Mr. Prout. SM, at 44-45; PB, at 32. According to Mr. Prout, the officers were "really good . . . [and] super polite." Deposition of John Prout, at 10.

At the police station, Davis refused to be photographed or fingerprinted. He again demonstrated his karate skills by kicking and punching the air around him. SM, at 61; PB, at 54. The officers processed a misdemeanor charge against Davis and discovered that he had other outstanding misdemeanor warrants against him. When they told Davis that if he refused to be printed they had been instructed to take him to the Genesee County Jail, Davis remarked that was all right, "I'll eat my Thanksgiving on you." PB, at 53.

On route to the jail, Davis began carrying on again about Mr. Prout saying that he was going to go down to

the mission and kick out the rest of the windows. SM, at 68-69. When they arrived at the County Jail, the deputies refused to accept Mr. Davis as an inmate because Davis was only charged with misdemeanors, and the jail was at capacity. Under Michigan statute, if the county deputies accepted Davis as a prisoner, they would be required to release a prisoner into the community. COUNTY JAIL OVERCROWDING EMERGENCY POWERS ACT, MCL 801.51 *et seq.*; MSA 28.1758(1) *et seq.*

When Officer Murphy went to retrieve Mr. Davis from the county jail holding cell, he asked Davis where he wanted to go. Davis replied, "Take me back to the mission and I'll break out the rest of the windows." SM, at 80, 86. Uncertain about what to do, Officer Murphy called the police station to advise of the jail's refusal to accept Davis and to ask what to do with him. Sergeant Mabry asked Murphy if Davis was so drunk that he was a danger to himself, and Officer Murphy advised that he was not. SM, at 88. The Sergeant said, "Go ahead and release him PFI [pending further investigation]." Sergeant Mabry meant to convey, and Officer Murphy understood, that Officer Murphy had some discretion in the matter of what to do with Mr. Davis. Deposition of Jeffrey Mabry, at 13; SM, at 89-90. The officers drove Davis away from the area of the mission and let him off at the lighted entrance to Bluebell Beach, a public park. Although the officers believed that the speed limit on the adjacent road was lower, it is undisputed that there was no posted speed on this two lane road, and, therefore, under Michigan law the speed limit was 55 MPH.

The above facts are undisputed, but from here the parties' versions diverge. Officers Brady and Murphy

testified that because Davis was threatening to return to the mission and break more windows, they told Davis to tell them someplace where they could take him; that Davis replied that he wanted to be taken to the North end, where he had an uncle; and that they drove him to the North end and released him at the lighted park entrance. Davis said that the officers did not ask him where he wanted to go. He insisted that they drove to the North end and let him off on an unfamiliar street, in order to "teach him a lesson."

It is also undisputed that Mr. Davis walked to several houses near the park and talked to a Mrs. Piccabotta and her daughter, and that after leaving her house he encountered Genesee Township Police Officer Carlson. Officer Carlson talked to Davis for a few minutes and then drove away. The Piccabottas and Officer Carlson disagreed with Davis regarding the substance of their contacts with Davis. Mrs. Piccabotta said that Davis was angry with the Flint police officers, and claimed that he was going to sue them. She testified that she offered to help Mr. Davis by calling someone to assist him, but that he refused any help saying only that he wanted witnesses for his law suit against the officers. Deposition of Sheron Piccabotta, at 17-18. Mr. Piccabotta called 911. Minutes later, responding to that call, Township Officer Carlson encountered Davis, who flagged him down in the middle of the road. Davis told Officer Carlson that he wanted to sue the Flint officers. Officer Carlson said that he, too, offered to call a taxi or an ambulance, or otherwise to assist Davis, but he refused saying that all he wanted was witnesses. Deposition of Bruce Carlson, at 19. Officer Carlson said that he could not determine whether he was intoxicated. Davis

claims that he asked all of these people for help but that they refused to help him in any way. Within minutes of Officer Carlson's departure, Davis was struck by a car and seriously injured.

B. PROCEEDINGS BELOW:

Davis brought an action in the United States District Court for the Eastern District of Michigan, which included several state common law claims and federal claims under 42 U.S.C. §§ 1983 and 1985. In his § 1983 claim, Davis asserted that his rights under the Fourth, Fifth, and Fourteenth Amendments of the Constitution of the United States were violated. The complaint contained a separate count entitled "Special Relationships," in which Davis asserted that "[o]nce defendants had custody and control of Steverson Davis, they owed him the duty of reasonable care and protection because of the special relationship between the officers and Steverson Davis as their detainee." First Amended Complaint, at ¶ 30, Appendix, at 30a. Davis claimed that the officers breached the duty "of reasonable care and protection" owed to him by "[p]lacing [him] in a position of danger that he would not otherwise have been in but for the actions of the defendants." *Id.*, at ¶ 31C, Appendix, at 30a. Finally, the complaint alieged that "[d]efendants acted with deliberate indifference to the rights, care and protection of Steverson Davis while he was in the custody, care and control of defendants." *Id.*, at ¶ 32, Appendix, at 30a-31a.

The Officers answered denying that they had a special relationship with Davis after they released him from

custody and asserted an affirmative defense of qualified immunity.

Petitioners filed a motion for summary judgment asserting that the § 1983 count failed to state a claim. The motion was argued before the District Court on January 8, 1996. Officers Brady and Murphy asserted that:

1. They had no special relationship with Mr. Davis at the time of his injury, because their relationship with him terminated upon his release from custody, and there was no obligation to protect Davis thereafter. Transcript 1/8/96, hereafter T1, at 8.

2. They did nothing affirmatively to prevent Davis from caring for himself and did not place Davis in a position where injury was certain to occur. T1, at 5.

3. They were entitled to qualified immunity because there was no clearly established right "not to be taken somewhere, even taken against your will and dropped off if that's not the cause of the injury." T1, at 8-9.

4. They were entitled to immunity unless their acts "shocked the conscience," citing *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 103, 103 L.Ed.2d 249, 109 S.Ct. 998 (1989), or were at least "egregious," citing *Foy v. City of Berea*, 58 F.3d 227 (6th Cir. 1995). T1, at 10.

Davis argued that when the officers arrested him a "special relationship" was "triggered," and they owed him a "duty of reasonable care and protection." T1, at 13. Furthermore, he argued, that duty of care "cannot be avoided by deciding to release someone who was still high – highly intoxicated and who was unable, realistically, to care for his needs." T1, at 13. Asserting that

Davis' release by the officers at Bluebell Beach Park violated the Sergeant's order to release him at the jail and a departmental policy against transporting a detainee without seeking permission, Davis argued that the officers placed him in a position of danger by releasing him in a dark area while he was still so intoxicated that he was a "danger to himself." T1, at 17-19. Petitioners replied that if police department policy were violated, that was irrelevant to the question whether a constitutional violation was alleged.

The District Court denied the motion for summary judgment holding that there was "no exigency" which justified the officers releasing Davis on a dark country road, miles from the sight of his arrest and in a drunken condition. Appendix, at 21a. "If the facts are borne out at trial and those facts certainly constitute **deliberate indifference** and any reasonable officers under the circumstances should have been well aware that he (sic) was prohibited under his own doing from placing citizens **dependent upon the paternal status of the state in such danger.**" Appendix, at 21a (emphasis added).

After the conclusion of discovery, Petitioners brought another motion for summary judgment on both the § 1983 and § 1985 claims. On November 18, 1996, the Court heard argument on the motion, granted the dismissal of the § 1985 claim as unsubstantiated, and again denied the motion as to the § 1983 claim. The Court held that "the standards of *DuChaney* (sic) were met. The special relationship was established which required that the officers **provide for his safety thereafter.**" Appendix, at 17a (emphasis added). The officers violated that duty, the

Court found, by releasing Davis in a dangerous situation and by being "deliberately indifferent to [Davis'] needs . . . . " Appendix, at 18a.

Petitioners Brady and Murphy appealed the denial of their motion for summary judgment to the United States Court of Appeals for the Sixth Circuit. On May 8, 1998, eighteen days before this Court's opinion in *County of Sacramento v. Lewis*, 523 U.S. ___, 140 L.Ed.2d 1043, 118 S.Ct. ___, 1998 U.S. LEXIS 3404 (May 26, 1998) the Sixth Circuit affirmed the denial of Petitioners' motion for summary judgment. 143 F.3d 1021 (6th Cir. 1998). The Court of Appeals held that in order for the Court to find a violation of a constitutionally protected right:

> First, . . . the court must conclude that the plaintiff and the state actors had **a sufficiently direct relationship** such that the defendants owed [him] a duty not to subject [him] to danger. Second, the court must also conclude that the officers where sufficiently culpable to be liable under a substantive due process theory.
>
> Appendix, at 5-6 (emphasis added).

Citing *DeShaney*, the Court held that since Davis had been in custody the officers owed him a duty:

> after taking Davis into custody, the defendant officers dropped Davis off on a dark, busy highway and left him there against his will. In so doing, the defendant officers took the affirmative act of restraining Davis's freedom to act on his own behalf and consequently imposed upon **themselves a duty to ensure that they were not placing him in danger.**
>
> Appendix, at 7a (emphasis added).

In response to Petitioners' argument that *DeShaney* only applied to situations where the state restrained a person, thereby taking away his ability to care for himself, the Court stated that *DeShaney* suggests "that the state may owe a duty to individuals in certain non-custodial settings," and, quoting another Sixth Circuit case, held that this language "stands for the proposition that 'a duty to protect can arise in a noncustodial setting if the state does **anything** to render an individual more vulnerable to danger.' " Appendix, at 9a (emphasis added). Rejecting Petitioners' argument that any duty of reasonable protection ended when they released Davis from custody, the Sixth Circuit held that, "[w]hat is key is that the defendant officers put Davis in a situation, while in custody, and allegedly against his will, that caused his injuries." Appendix, at 10a. Finally, having found that Petitioners owed a "duty of care," the Sixth Circuit held that the question whether they had breached that duty was to be evaluated under the **deliberate indifference** standard, and so evaluated, that Davis' complaint "supports a claim that defendant officers acted with **deliberate indifference** to the threat of injury to him. They knew, or reasonably should have known, that Davis was drunk and unable to care for himself." Appendix, at 12a (emphasis added).

In the Sixth Circuit a motion for reconsideration must be filed within fourteen days of the decision. Internal Operating Procedure 20.1. The *Lewis* opinion had not yet been released. Petitioners filed a timely Motion for Rehearing and Suggestion for a Rehearing En Banc on May 22, 1998. The motion asserted that the hearing panel had violated *DeShaney* because *DeShaney*'s duty was

predicated upon state restraint, not simply the fact that the plaintiff had once been in custody. It argued that "under the panel's decision, officers face liability for subsequent injuries whether they release an intoxicated person at home, on the street, or at a detox center." Appendix, at 42a. In addition, the motion asserted that the Sixth Circuit had not previously adopted a "state created danger" theory as the law of the circuit and should, therefore, reconsider the question of qualified immunity. Appendix, at 40a-41a. On June 29, 1998, the Sixth Circuit denied the motions.

As stated above, this Court's opinion in *County of Sacramento v. Lewis, supra,* was released eighteen days after the panel's opinion affirming the denial of Petitioners' motion for summary judgment, and four days after the filing of the motion for reconsideration. The Sixth Circuit rules do not provide for the filing of additional briefs or motions.

REASONS FOR GRANTING THE WRIT

INTRODUCTION:

The Sixth Circuit's analysis of the question whether Respondent's complaint stated a claim under 42 U.S.C. § 1983 for violation of his rights under Fourteenth Amendment substantive Due Process never addressed what this Court described as "the threshold question . . . whether the behavior of the governmental officer [was] so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *County of Sacramento v. Lewis,* 140 L.Ed.2d, at 1058 n.8. Indeed, the

Court's analysis failed even to recognize that the core concept of the Due Process clause is the "protection against arbitrary action." *Id.*, at 1056-1057. Moreover, failing to heed this Court's direction "to preserve the constitutional proportions of constitutional claims, lest the Constitution be demoted to . . . a font of tort law," the Sixth Circuit clearly approached this case as a tort case. In reaching its result, the Sixth Circuit misapplied this Court's opinion in *DeShaney*, violated this Court's subsequent opinion in *Lewis*, and placed itself in direct conflict with the Seventh Circuit's opinion in *Estate of Stevens v. City of Green Bay*, 105 F.3d 1169 (3rd Cir. 1997). For each of these reasons this Court should grant this petition for a writ of certiorari.

I.

THE COURT BELOW ERRED WHEN IT EVALUATED THE QUESTION WHETHER A CLAIM HAD BEEN STATED UNDER 42 U.S.C. § 1983 FOR VIOLATION OF THE FOURTEENTH AMENDMENT'S SUBSTANTIVE DUE PROCESS GUARANTEES UNDER A "DELIBERATE INDIFFERENCE" STANDARD RATHER THAN THE "SHOCKS THE CONSCIENCE" STANDARD THAT THIS COURT ADOPTED IN *COUNTY OF SACRAMENTO v. LEWIS*.

In *County of Sacramento v. Lewis, supra*, this Court answered the question whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing injury through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender. Pointing to its prior opinions that the "core of the concept" was

"protection against arbitrary action," 140 L.Ed.2d, at 1056-1057, and that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense,' " *id.*, at 1057, this Court rejected the Ninth Circuit's use of the deliberate or reckless indifference standard and held that "in a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Id.*, at 1058 n.8. Stating that "the measure of what is conscience-shocking is no calibrated yard stick," (*id.*, at 1058) and that the "concept of conscience-shocking duplicates no traditional category of common-law fault," (*id.*), this Court held that where there is no "intent to injure in some way unjustifiable by any governmental interest," (*id.*, at 1059) "our concern with preserving the constitutional proportions of substantive due process demands an *exact analysis of circumstances* before any abuse of power is condemned as conscience-shocking." *Id.*, at 1060 (emphasis added). In *Lewis*, this Court held that such an analysis must take into account recognition and balancing of competing law enforcement "obligations that tend to tug against each other." *Id.*, at 1061. After a careful analysis of those law enforcement interests in light of the facts presented, this Court held that, without an intent to cause harm, the Fourteenth Amendment did not give rise to liability. *Id.*, at 1062.

In the case at bar, no such analysis was engaged in by either the District Court or the Sixth Circuit Court of Appeals. Indeed, the opinion of the Sixth Circuit never once even mentions the phrase "shocks the conscience" in its analysis or in its explication of the interests protected

by the Fourteenth Amendment. The opinion below does not even purport to analyze "the large concerns of the governors and the governed" which engaged this Court in *Lewis* when analyzing the conduct at issue. Rather, the Sixth Circuit analyzed the issue as presenting two different questions: Whether Mr. Davis and the police officers had a "**sufficiently direct relationship**" such that the officers owed Davis a duty not to subject him to danger, (Appendix, at 6a) and, if so, whether the officers "acted **with deliberate indifference** to the threat of injury to him." Appendix, at 12a (emphasis added). In answering the second question the Sixth Circuit violated this Court's opinion in *Lewis*; and in answering the first question it misapplied this Court's holding in *DeShaney*. *See*, REASON FOR GRANTING WRIT, AT II.

The standard announced in *Lewis* calls for the presentation and analysis of facts additional to those that were considered in evaluating whether the officers were deliberately indifferent to Mr. Davis' rights. Perhaps because the use of the deliberate indifference standard in the context of municipal liability is focused upon searching for rules of governmental practice, the courts below placed emphasis upon the officers' alleged violation of police department procedures. As *Lewis* has now made clear, however, such a focus is misplaced and completely irrelevant. Indeed, the officer in *Lewis* had violated departmental regulations which directly governed conduct in high speed chases, a factor which this Court gave no weight in the constitutional analysis. Rather, *Lewis* directs that when a police officer is alleged to have violated the substantive guarantees of the Fourteenth Amendment's Due Process clause in the exercise of his

law enforcement duties, the District Court should consider: what the officer's law enforcement object was; whether there were competing law enforcement objectives that tug in different directions making the exercise of discretion problematic; the need of police officers to act decisively under pressure as the situation evolves; the absence the luxury of the second chance that repeated reflection permits; the time frame and factual context within which the law enforcement decision is made; and, finally, whether, in light of these considerations, the acts of the state officers shock the contemporary conscience. None of that analysis was undertaken here, and, as a result, this Court should remand this matter to the Sixth Circuit, perhaps with direction to remand to the District Court, for consideration in light of this Court's subsequent opinion in *Lewis*.

The facts of the instant case clearly call for analysis under *Lewis*. Here, as in *Lewis*, the officers did not have an intent to injure. Here, the officers, like officers in *Lewis*, were faced with conflicting law enforcement objectives. On the one hand these city police officers had arrested a person for committing a criminal offense, who they had to release because the county jail refused to accept him. On the other, the arrested person was familiar with karate, had told the officers that he was "going to beat [the manager of the homeless shelter's] ass," and had further vowed that if released by the officers he would return to the shelter and break out the rest of the windows. The officers' attempt to protect both the person of Mr. Prout and the property of the homeless mission, was clearly a legitimate, countervailing law enforcement objective. Like the situation in *Lewis*, these interests pull

in conflicting directions. These officers, like the officers in *Lewis*, had to act decisively, under pressure, and as the situation developed. The circumstances called for quick action without the luxury that true reflection permits. The District Court and the Sixth Circuit called Officer Murphy and Officer Brady to task for the decision that they made amongst these competing objectives, but they never evaluated that choice in the constitutional terms required by *Lewis*.

The Sixth Circuit has had a long history of confusing the state of mind that supports a constitutional violation with the state of mind that supports only a claim in tort. Indeed, in *Lewis* this Court specifically recognized that in the context of a high speed police chase, the Sixth Circuit stood alone among the circuits in setting far too low a test of culpability. In footnote 3 of that opinion, 140 L.Ed.2d, at 1053, this Court could only surmise that the Sixth Circuit would raise its test from "gross negligence" to "deliberate indifference," the test that this Court then rejected as constitutionally too low. It is no wonder, then, that without the benefit of the *Lewis* opinion, the Sixth Circuit did not see fit to increase its constitutional sights by two notches – from "gross negligence" to "shocks-the-conscience." Clearly, this case should be reevaluated in light of *Lewis*. The case at bar is now binding law in the Sixth Circuit and governs all subsequent cases in the Circuit. It was decided without the benefit of *Lewis*, applies the wrong standard, and will work significant mischief unless vacated and remanded by this Court.

In cases decided since the *Lewis* decision, other circuits evaluating substantive Due Process claims against police officers have recognized the importance of the

Lewis opinion, and benefited from its directions. In *Rogers v. City of Little Rock*, 1998 U.S. App. LEXIS 18340 (8th Cir. 1998) a police officer was charged with violating substantive Due Process guarantees when he stopped a woman for a traffic offense, then released her and followed her to her home, where she said he forced her to have intercourse. The Eighth Circuit first described the opinion in *Lewis*:

> In a lengthy discussion of the fifty year history of the shocks the conscience test and the policy behind it, the Court explained why this is the appropriate test to apply to substantive due process claims and how the test serves to distinguish abusive executive acts amounting to constitutional violations from breaches of common law duties covered by tort law. *Id.* at 1717-18. Conduct that is 'intended to injure in some way unjustifiable by any government interest' is likely to be conscience shocking. . . . The threshold question in a due process challenge to abusive conduct by a state actor is 'whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.' "
>
> *Id.*, at 6.

Using the appropriate test, the Court held that the conduct at issue did shock the contemporary conscience because it was intentional conduct at the extreme end of the scale and was unjustified by any governmental interest.

In *Armstrong v. Squadrito*, U.S. LEXIS 17018 (7th Cir. 7/24/98) plaintiff agreed to turn himself in on a bench

warrant regarding a child support problem, with the understanding that he would be held for a couple of hours and then taken to court and released. He appeared at the jail as agreed, but he was kept there for 57 days without ever being taken to court, despite his repeated requests to find out why he was not on the arraignment list. In a thoughtful analysis of the historic concerns expressed by this Court in *Lewis*, the Seventh Circuit evaluated the right to be heard promptly on a bench warrant; and, focusing upon the jail officers' opportunity to frequently reflect upon the basis for Mr. Armstrong's incarceration because of his repeated requests for information, and upon the absence of a competing law enforcement objective, found the jail employees' actions shocking.

This case, too, would benefit substantially from reconsideration in light of *Lewis*, and, since the case is before this Court pre-trial, there is no reason for this Court not to grant certiorari and summarily remand for reconsideration.

When this Court rendered its opinion *DeShaney v. Winnebago, supra,* it remanded cases which were evaluated under guidelines established prior to that opinion, for consideration in light of the new opinion. *See, e.g., Smith v. Stoneking*, 489 U.S. 1062, 103 L.Ed.2d 804, 109 S.Ct. 1333 (1989); *City of New Kensington v. Horton*, 489 U.S. 1062, 103 L.Ed.2d 805; 109 S.Ct. 1334 (1989). The same course should be followed here.

II.

THE COURT BELOW ERRED WHEN IT FOUND *DeSHANEY v. WINNEBAGO COUNTY DEP'T OF SOC. SERVS.* STANDS FOR THE PROPOSITION THAT THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE IMPOSES LIABILITY UPON A POLICE OFFICER WHO DOES *ANYTHING* TO ENHANCE AN INTOXICATED PERSON'S VULNERABILITY TO INJURY AFTER THAT PERSON IS RELEASED FROM CUSTODY.

In *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 103 L.Ed.2d 249, 109 S.Ct. 998 (1989), a child who was suspected of suffering from physical abuse at the hands of his father, was removed from his father at the petition of the Department of Social Services and placed in the temporary custody of a hospital. Subsequently, the Department of Social Services returned the child to the custody of his father, who beat him so severely that he suffered brain damage and was confined to an institution for the profoundly retarded. In an action brought under 42 U.S.C. § 1983, the District Court granted summary judgment to the DSS employees, rejecting the child's argument that the Fourteenth Amendment's substantive Due Process guarantees imposed upon the DSS employees the duty to protect him from violence at the hands of his father. The Seventh Circuit Court of Appeals affirmed that holding, placing itself in conflict with a holding of the Third Circuit, which had found a duty to provide adequate protection in similar circumstances. This Court granted certiorari in order to resolve that conflict. Noting that "nothing in the language of the Due Process Clause itself required the State to protect the life, liberty, and property of its citizens against

invasion by private actors," 489 U.S., at 195, this Court "concluded that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.*, at 197.

Next, this Court turned to the child's assertion that while there was no duty to provide the general public with adequate services, a duty arose to protect this child because the state knew that the child faced danger and had taken him into its custody. Petitioner argued that the DSS' failure to protect the child under these circumstances was an abuse of governmental power so shocking to the conscience as to constitute a substantive Due Process violation. This Court unequivocally rejected those arguments, holding that only in limited circumstances where the "State takes a person into its custody **and holds him there against his will**, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *Id.*, at 199 (emphasis added). To clarify its holding, this Court pointed to its previous opinions imposing upon the state a duty of care for persons "wholly dependent on the State" because they are incarcerated in prison following a criminal sentence, held in jail pending a criminal trial, or involuntarily committed to a mental institution. *Id.*, at 200. Furthermore, this Court noted that even in those limited circumstances, "we have recognized that the State 'has considerable discretion in determining the nature and scope of its responsibilities.' " *Id.*, at 200 n.7, quoting *Youngberg v. Romeo*, 457 U.S. 307, 317, 73 L.Ed.2d 28, 102 S.Ct. 2452 (1982). Providing even further clarification of its holding, this Court stated that the constitutional duty

was not imposed because of the state's knowledge of Respondent's vulnerability:

> The affirmative duty to protect **arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.** . . . In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.
>
> 489 U.S., at 200 (emphasis added).

Next, this Court rejected the argument that the duty was triggered because the state had earlier taken custody of the child:

> The Estelle-Youngberg analysis simply has no applicability in the present case. Petitioners concede that the harms Joshua suffered did not occur while he was in the State's custody, but while he was in the custody of his natural father who was in no sense a state actor. While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; **the State does**

> **not become the permanent guarantor of an individual's safety by having once offered him shelter.**
>
> *Id.*, at 201 (emphasis added).

The Sixth Circuit analyzed the question whether there was a duty imposed by the Fourteenth Amendment's substantive guarantees by looking to see if there were a "sufficiently direct relationship" between the police officers and Mr. Davis so as to impose a duty. The Court held that such a relationship existed when the officers placed Davis under custodial arrest. Then, the Sixth Circuit concluded that once a person is placed in a custodial arrest by a state officer, that officer has a duty to protect him from injury caused by a third party even after his release from custody, if, while a custodial relationship existed, the officer did "**anything** to render [him] more vulnerable to danger." Appendix, at 9a, quoting *Gazette v. City of Pontiac*, 41 F.3d 1061, 1065 (6th Cir. 1994) (emphasis added). In other words, the Court stated, "[w]hat is key is that the defendant officers put Davis in a situation, while in custody, and allegedly against his will, that caused his injuries." Appendix, at 10a. Summarizing, the Sixth Circuit concluded:

> When a plaintiff alleges that state actors violated substantive due process by placing him at risk of harm from a third party, he must demonstrate, first that the defendants owed him a duty not to subject him to danger and, second, that the defendants violated this duty by exhibiting deliberate indifference to the plaintiff's well being.
>
> Appendix, at 12a.

The Sixth Circuit opinion is clearly at odds with this Court's opinion in *DeShaney*. It completely ignores this Court's explanation that the duty of care which is placed upon the state when it incarcerates or commits one of its citizens is not a result of the state's knowledge "of his predicament" (*e.g.*, that he has been drinking), "but from the limitation which it has imposed on his freedom to act on his own behalf." Here, however, when the officers released Mr. Davis from custody at a location away from the scene of the crimes that he had committed because he threatened to renew his destruction of mission property if released near the homeless shelter, the only "limitation . . . imposed on his freedom to act" was the limitation of his ability to commit more crimes. Surely, that limitation, grounded as it was in a legitimate law enforcement objective, is not constitutionally similar to the situations described in *DeShaney* – where the state "takes a person into custody and holds him there." The kind of "but for" analysis employed by the Sixth Circuit simply cannot be used to answer the constitutional questions at issue. Indeed, under the Sixth Circuit's analysis, this Court would have upheld the claim made on behalf of young Joshua DeShaney, because while that child was in the custody of the state, state DSS officers "put him in a situation . . . that caused his injury" by returning him to his father despite knowing of the possible peril in which they placed him. But for that child's return to his father he would not have been injured. But for the fact that the police chased Lewis on his motorcycle at high speeds, he would not have been injured. Again, it is clear that the Sixth Circuit was focused upon tort concepts rather than on concepts of constitutional dimension.

The Sixth Circuit sought to distinguish the holding in *DeShaney*:

> *DeShaney*, however, is not dispositive here. Language in that opinion suggests that the state may owe a duty to individuals in certain non-custodial settings:
>
> > While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter.
>
> 489 U.S. at 201. Significantly, we have previously suggested this language in *DeShaney* stands for the proposition that "a duty to protect can arise in a noncustodial setting if the state does **anything** to render an individual more vulnerable to danger."
>
> Appendix, at 8a-9a (emphasis added).

This is a complete misunderstanding and misapplication of the *DeShaney* holding. It simply goes far beyond the meaning of *DeShaney* to take this Court's observation in dicta that the state "**did not do anything**" to make the DeShaney child more vulnerable to danger, and turn it around to find a constitutional rule that "**if the state does anything**" to render an individual more vulnerable to

danger" the Fourteenth Amendment's guarantee of substantive Due Process has been violated. This Court's negative observation simply cannot be turned inside-out to find a positive rule. If it could, *DeShaney* would have been decided differently.

What the Sixth Circuit did, in effect, was to create a tort-based "but for" liability out of an opinion, whose central point was to remind the lower courts, once again, that the Fourteenth Amendment is not a "font of tort law." As this Court clearly explained, the state officer's actions in *DeShaney* may have created a liability under state tort law, "[b]ut here the claim is based on the Due Process Clause of the Fourteenth Amendment, which as we have said many times, does not transform every tort committed by a state actor into a constitutional violation." *DeShaney*, 489 U.S., at 202. This point is made by this Court even more forcefully in its subsequent opinion in *County of Sacramento v. Lewis, supra.*

III.

THE OPINION OF THE SIXTH CIRCUIT CONFLICTS WITH AN OPINION OF THE SEVENTH CIRCUIT IN *ESTATE OF STEVENS v. CITY OF GREEN BAY.*

Even if this Court does intend to permit courts below to find substantive Due Process violations in non-custodial situations whenever a state officer's contact with a person enhances that person's vulnerability to danger, this Court must resolve a conflict between the circuits regarding the degree of danger-enhancement required to support such a constitutional violation. In this case, the Sixth Circuit found that if the state does "**anything** to

render an individual more vulnerable to danger" the Constitution is violated. In *Estate of Stevens v. City of Green Bay*, 105 F.3d 1169 (7th Cir. 1997), the Seventh Circuit held that "[t]o recover under this theory, the estate must demonstrate that the state **greatly increased** the danger to Stevens **while constricting access to self-help**; it **must cut off all avenues of aid** without providing a reasonable alternative. Only then may a constitutional injury have occurred." *Id.*, at 1177 (emphasis added).

Estate of Stevens also presented a police officer with a belligerent drunk. In that case, Stevens got so drunk at a bar that he got into a fight with a Green Bay Packer. The bar's bouncers forced the fight outside into the parking lot. When the police arrived, both sides refused to press charges. The bar manager told the officer that Stevens, who was bleeding, was not welcome in the bar and could not reenter, so the officer went inside and told Stevens' friends that he could not return. The officer offered to call for medical assistance or a taxi for Stevens, but he declined. When Stevens began walking back towards the bar's entrance, the officer prevented him from doing so. Finally, in order to get Stevens out of the area, the officer offered Stevens a ride to a party store where there was a telephone. Stevens accepted. *Id.*, at 1172. Ninety minutes after Stevens was dropped off at the party store, he was struck by an automobile and died. His autopsy showed a blood-alcohol level higher than Mr. Davis'. Like the case at bar, the estate focused its claim upon an asserted right to protective services and cited *DeShaney*. *Id.*, at 1174. Reviewing the same language from *DeShaney* that the Sixth Circuit reviewed in the case at bar, the Seventh Circuit held that:

> "[t]o recover under this [state enhanced danger] theory, the estate must demonstrate that the state **greatly increased** the danger to Stevens **while constricting access to self-help**; it must **cut off all avenues of aid without providing a reasonable alternative**, Only then may a constitutional injury have occurred.
>
> *Id.*, at 1177 (emphasis added).

Thus in two jurisdictions which have found in *DeShaney* approval of a state enhanced danger theory for substantive Due Process violations, the Sixth and Seventh Circuits are diametrically at the extremes regarding the extent of danger-enhancement which must be shown to establish a constitutional violation. This is an important issue, which this Court should resolve. As this Court appreciated in its opinion in *Lewis*, police officers need guidance in order appropriately to handle situations which occur relatively frequently – like high speed chases. A police officer's encounter with a drunk and belligerent citizen is one of those all too frequently recurring situations. Thousands of times every day, a police officer in this country confronts a drunk. Unless these officers get guidance from this Court as to the extent of their responsibilities, their safest response is to do nothing, ignore the drunk, and hope that he does not commit any serious crimes. And, if he does, at least the officers are not subject to the second guessing that a subsequent § 1983 action without clear standards defining the right will engender. Indeed, the concern for "over deterrence" that an insufficiently defined right causes is a cornerstone of this Court's formulation of the qualified immunity doctrine. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L.Ed.2d 396; 102 S.Ct. 2727 (1982). This Court should

grant a writ of certiorari in order to resolve this important conflict and clarify the contours of the substantive Due Process right involved.

CONCLUSION

For these reasons this Court should grant this petition.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEVERSON DAVIS, *Plaintiff-Appellee,*	)	
v.	)	No. 96-2575
PATRICK BRADY and SHAWN MURPHY, *Defendants-Appellants.*	)	

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 95-71435 – Anna Diggs Taylor, Chief District Judge.

Argued: March 13, 1998

Decided and Filed: May 8, 1998

Before: KEITH, SUHRHEINRICH, and DAUGHTREY, Circuit Judges.

COUNSEL

ARGUED: Frederick L. Schmoll, III, GAULT DAVISON LAW OFFICES, Flint, Michigan, for Appellants. George R. Hamo, Flint, Michigan, for Appellee. **ON BRIEF:** Frederick L. Schmoll, III, GAULT DAVISON LAW OFFICES, Flint, Michigan, for Appellants. George R. Harno, Flint, Michigan, for Appellee.

OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. Defendant police officers Patrick Brady and Shawn Murphy appeal the district court's denial of summary judgment on qualified immunity grounds. The plaintiff, Steverson Davis, alleges that the defendants violated his substantive due process rights by placing him at risk of harm when they abandoned him in an inebriated condition on an unfamiliar highway. The district court found that the record presented a claim sufficient to defeat summary judgment, including the establishment of a duty not to subject Davis to danger, and that the defendant officers acted with deliberate indifference to the threat of injury to Davis. We agree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Having consumed a substantial amount of Thunderbird wine and a half-pint of vodka, Davis attempted to enter the Carriage Town Mission in Flint, where he had been living. The mission staff refused him entry due to his inebriated condition. Davis became violent and broke some of the mission's windows. The mission staff called the police.

Officers Murphy and Brady responded to the call. At 6:48 that evening, they arrested Davis for intoxication and disorderly conduct and brought him to the Flint police station. Davis was subsequently transferred to the county jail, but that facility was full. The desk sergeant therefore instructed Officers Murphy and Brady to "release Davis at the county jail if he was not so drunk that he would be a hazard to himself." No permission to transport Davis was requested by the officers nor given

by their sergeant. Disregarding these instructions, the officers handcuffed Davis and placed him back in the squad car.

The officers then drove Davis to Bray Road in Genesee Township, which was located outside the city limits of Flint, and let Davis out of the squad car at the entrance to Bluebell Beach. Bray Road is a 55-mile-per-hour speed limit area, with few street lights and no sidewalk. The officers insist that they released Davis at this location at Davis's request, but Davis denies making such a request, and contends that the officers brought him to Genesee Township to "teach [him] a lesson." In his account of the situation, the officers threw him out of the car, forced him to the ground, called him a "smart ass," and told him to find his own way back into the city.

After the officers left, Davis headed for some nearby houses, where he asked one of the residents to call the police. Genesee Township Police Officer Bruce Carlson responded to the call at 9:03 p.m. According to Officer Carlson, he offered to give Davis a ride or to call someone for him, suggesting an ambulance, a taxi, and a friend or relative. Officer Carlson insists that Davis rejected assistance, calling him "just another damn white officer." In contrast, Davis maintains that he asked Officer Carlson for a ride back to Flint and that Carlson refused. Officer Carlson testified that he did not have sufficient contact during this time to ascertain whether Davis was drunk.

Officer Carlson left at 9:12 p.m., and Davis was hit by a car approximately seven minutes later, sustaining serious permanent injuries. One of his legs was amputated, and he is now a semi-quadriplegic.

Officers Brady and Murphy contend that Davis was sober when they released him on Bray Road. However, the parties have stipulated that Davis's blood alcohol level was still .176 at 10:00 p.m., when he arrived at the hospital after the accident. A toxicologist testified that at the time Davis was released on Bray Road, his blood alcohol would have been between .191 and .206, and that at that level, he would have shown signs of perception impairment, disorientation, confusion, and lack of coordination. In addition, other witnesses who saw Davis on Bray Road testified at trial that he was staggering, slurring his words, seemed drunk, and could hardly stand up.

Davis filed a lawsuit against Officers Brady and Murphy for alleged violations of his civil rights under 42 U.S.C. § 1983. The officers moved for summary judgment, which was granted in part and denied in part. The officers now appeal the district court's denial of summary judgment.

STANDARD OF REVIEW

A denial of summary judgment on qualified immunity grounds is reviewed de novo. *Washington v. Newsom*, 977 F.2d 991, 993 (6th Cir. 1992), *cert. denied*, 507 U.S. 1031 (1993). When analyzing a qualified immunity issue, we must first determine whether the plaintiff has shown a violation of a constitutionally protected right. *Megenity v. Stenger*, 27 F.3d 1120, 1124 (6th Cir. 1994). If so, the second step is to determine whether the right is so "clearly established" that a "reasonable official would understand

that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

DISCUSSION

Davis alleges that the officers violated his right to "substantive due process" under the Fourteenth Amendment when they deposited him on a dark, busy highway. Because Davis seeks to hold the officers liable in their individual capacities under 42 U.S.C. § 1983, he must show not only that the officers' actions were unconstitutional, but also that they should have known at that time that they were violating his rights. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "It is not necessary that the very action have been previously held unlawful but, given the preexisting law, the unlawfulness of the conduct must have been apparent." *Barton v. Norrod*, 106 F.3d 1289, 1293 (6th Cir.), *cert. denied*, 118 S. Ct. 341 (1997) (citation omitted).

We must therefore determine whether the individual officers violated law that was clearly established in 1994 when they abandoned Davis on the dark, busy highway. When, as here, a plaintiff alleges that state actors violated substantive due process by placing him at risk of harm from a third party, the court is presented with two distinct, though interrelated inquiries:

> First, in order to find for the plaintiff, the court must conclude that the plaintiff and the state

> actors had a sufficiently direct relationship such that the defendants owed [him or] her a duty not to subject [him or] her to danger. Second, the court must also conclude that the officers were sufficiently culpable to be liable under a substantive due process theory.

Stemler v. City of Florence, 126 F.3d 856, 866 (6th Cir. 1997), *petition for cert. filed* (U.S. Law Week, Feb. 11, 1998) (No. 97-1376).

A. Taking Davis Into Custody Established a Duty

With respect to the first question, we start from the proposition that although the state does not owe its citizens a constitutional duty to keep them from harm in all circumstances, such a duty will arise when the state has acted to deprive an individual of certain indicia of liberty:

> When the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – e.g., food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.

DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 200 (1989) (citation omitted).

In the present case, Davis's complaint alleges – and the record can reasonably be read to show – that after taking Davis into custody, the defendant officers dropped Davis off on a dark, busy highway and left him there against his will. In so doing, the defendant officers took the affirmative act of restraining Davis's freedom to act on his own behalf, and consequently imposed upon themselves a duty to ensure that they were not placing him in danger.

The defendants rely on *Foy v. City of Berea*, 58 F.3d 227 (6th Cir. 1995), to argue that they did not infringe upon Davis's liberty. In *Foy*, the plaintiff had been drinking in a dormitory with his friends. After receiving a complaint, the police came to the dormitory and told them, "Get in your car and get out of here or somebody is getting arrested." *Id.* at 228. Although the police had told them only to leave the premises, the plaintiff and his friends decided to take a lengthy drive from Berea, Ohio, to Crestline, Ohio. Forty-five minutes into that journey, the driver crashed the car, killing Foy. *Id.* This court held that the defendant police officers had not violated Foy's right to substantive due process, since there was no restraint on his liberty that had caused him to take the trip that resulted in his death. *Id.* at 230. *Foy*, however, is inapposite. The distinguishing factor between *Foy* and this case is that the officers never took the men in *Foy* into custody and, therefore, never assumed a duty to provide for their safety.

The defendant officers argue that they owed no duty of care to Davis because his injuries occurred after they

released him from custody and they did nothing to prevent Davis from caring for himself. The defendant officers cite *DeShaney*, 489 U.S. at 201, for this proposition. In DeShaney, the mother of a child who had been beaten by his father brought a civil rights action against social workers and local officials who had received complaints that the child was being abused by his father but had not removed him from his father's custody. The Supreme Court held that the state had no constitutional duty to protect the child because "the harms [the child] suffered did not occur while he was in the State's custody, but while he was in the custody of his natural father . . . " *Id.* The Supreme Court held that "in the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means." *Id.* at 200. Even though the state had previously taken the child into custody, the Supreme Court held that "the State does not become the permanent guarantor of an individual's safety by having once offered him shelter." *Id.* at 201.

DeShaney, however, is not dispositive here. Language in that opinion suggests that the state may owe a duty to individuals in certain non-custodial settings:

> While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to

> them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter.

489 U.S. at 201. Significantly, we have previously suggested that this language in *DeShaney* stands for the proposition that "a duty to protect can arise in a noncustodial setting if the state does anything to render an individual more vulnerable to danger." *Gazette v. City of Pontiac*, 41 F.3d 1061, 1065 (6th Cir. 1994). Unlike the situation in DeShaney, moreover, the defendant officers in this case placed Davis in a more dangerous situation than he was prior to their interference, when they drove him outside the Flint city limits and abandoned him on a dark and dangerous highway in an unfamiliar area.

Likewise, the defendant officers' contention that the release of Davis from their custody terminated their duty is unavailing. The holding in *Stemler*, 126 F.3d at 867-868, established that an officer's duty exists even after the custodial relationship has ended. In *Stemler*, this court determined that police officers violated a woman's substantive due process rights when they took her from a car in which she had been riding and placed her in a truck driven by her abusive, intoxicated boyfriend, who wrecked shortly thereafter. The court found that the woman was deprived of her liberty (and ultimately her life) without due process when the police threatened to arrest her if she did not leave with her boyfriend and, subsequently, physically placed her in his truck. Even

though the woman was out of police custody when she was killed, we held that the police had a duty to protect her by focusing on the fact that she was in the officers' custody at the time she was forced into the truck. *Id.* at 869.

Just as the police in *Stemler* had a duty to the plaintiff because they put her in harm's way, the defendant officers here owed Davis a duty. Based on *Stemler*, the fact that Davis's injuries resulted after the defendant officers released him from custody is not controlling. What is key is that the defendant officers put Davis in a situation, while in custody, and allegedly against his will, that caused his injuries.

Finally, the defendant officers assert that in 1994 there was no clearly established right not to be abandoned by the police and rely on *Walton v. City of Southfield*, 995 F.2d 1331, 1337 (6th Cir. 1993), to support this assertion. *Walton*, however, is inapposite. The plaintiffs in *Walton* were child passengers in a car driven by a woman who was arrested. The children were left to find a way home on their own. The court held that the officers were entitled to qualified immunity because *DeShaney* did not recognize a passenger's clearly established right not to be abandoned by the police after the arrest of the driver of the vehicle in which they were riding. *Id.* at 1337. The court also stated, however, that *DeShaney* did not foreclose the possibility that such a right existed if "abandonment in a forlorn place" was connected with the state's restraint of an individual's personal liberty. *Id.*

Unlike the children in *Walton*, Davis was in custody when he was abandoned. Because the defendant officers

had custody of Davis, they owed him a duty of protection that was violated when they abandoned him, in the words of *Walton*, in a "forlorn place."

B. Defendants Violated Their Duty to Davis by Exhibiting Deliberate Indifference

The determination that the officers owed Davis a duty of care does not end the court's inquiry, for it must also assess what duty of care they owed, and whether they breached that duty.

In cases such as this one, where the plaintiff suffered injury as a result of being placed in the state's custody, it has consistently and uncontroversially been the rule that a constitutional claim arises when the injury occurred as a result of the state's deliberate indifference to the risk of such an injury. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Wilson v. Seiter*, 501 U.S. 294, 303 (1991); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Although each of these cases involved an Eighth Amendment claim raised by a prisoner, we have repeatedly held that at least the same standard applies to substantive due process claims raised by other persons in the custody of the state. *See, e.g., Durham v. Nu'Man*, 97 F.3d 862, 869 (6th Cir. 1996) (patient at state mental hospital), *cert. denied*, 117 S. Ct. 1337 (1997); *Lintz v. Skipski*, 25 F.3d 304, 306 (6th Cir. 1994) (children in state foster home); *Heflin v. Stewart County*, 958 F.2d 709, 713-14 (6th Cir. 1990) (pretrial detainee); *Meador v. Cabinet of Human Resources*, 902 F.2d 474, 476 (6th Cir. 1990) (children in state foster home).

In the present case, Davis's complaint, as well as the evidence in the record, when read in the light most favorable to Davis, supports a claim that the defendant officers acted with deliberate indifference to the threat of injury to him. They knew, or reasonably should have known, that Davis was drunk and unable to care for himself. Independent witnesses testified under oath that Davis was staggering after the defendant officers released him, slurring his words, seemed drunk, and could hardly stand up. It was stipulated at trial that Davis's blood alcohol level was .176 percent at 10:00 p.m. when he arrived at the hospital after the accident. Additionally, a toxicologist placed his blood alcohol level at the time of the improper police release at approximately .20 percent. At such a level, expert testimony indicated, Davis would have had perception impairment, disorientation, confusion, and lack of coordination. Nevertheless, the defendant officers chose to act affirmatively to place Davis in harm's way.

CONCLUSION

When a plaintiff alleges that state actors violated substantive due process by placing him at risk of harm from a third party, he must demonstrate, first, that the defendants owed him a duty not to subject him to danger and, second, that the defendants violated this duty by exhibiting deliberate indifference to the plaintiff's well-being. In this case, the taking of Davis into custody triggered the defendant officers' duty to protect Davis. There is sufficient evidence in the record to demonstrate that the defendant officers violated this duty when they exhibited deliberate indifference to Davis's well-being by

abandoning him, in his inebriated state, on an unfamiliar, dark, and busy highway. Accordingly, we **AFFIRM** the district court's denial of the defendant officers' motion for summary judgment and **REMAND** the case for further proceedings.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

STEVERSON DAVIS,
Plaintiff,
vs
PATRICK BRADY
and SHAWN MURPHY,
Jointly and Severally,
Defendants.
_____/

CIVIL NO: 95-71435
JUDGE:
ANNA DIGGS-TAYLOR
ORDER

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THIS MATTER having come before the court on defendants motion to dismiss counts I, II and IV, the court having read the briefs and listened to oral arguments, for the reasons stated on the record on November 18, 1996, defendant's motion is granted as to Count II but denied as to Counts I and IV.

/s/ Anna Diggs-Taylor
ANNA DIGGS-TAYLOR,
U.S. DISTRICT JUDGE

Dated: Nov. 26, 1996

Approved:

/s/ George R. Hamo
GEORGE R. HAMO (P33033)
Attorney for Plaintiff

/s/ Michael Gildner For (With Permission 11/19/96)
FREDERICK SCHMOLL, III (P20024)
Attorney for Defendant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STEVERSON DAVIS,

Plaintiff,

CIVIL ACTION NO. 95-CV-71435-DT

v.

PATRICK BRADY,
SHAWN MURPHY,

Defendants.

_____/

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

BEFORE THE HONORABLE ANNA DIGGS TAYLOR
United States District Judge
738 US Courthouse & Federal Building
231 Lafayette Boulevard West
Detroit, Michigan
Monday, November 18, 1996

APPEARANCES:

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Flint, MI 48502
In behalf of Plaintiff.

FREDERICK SCHMOLL, ESQ.,
Gault Davison, ESQ.,
Tenth Floor, Northbank Center
432 North Saginaw Street
Flint, MI 48502
In behalf of Defendants.

* * *

[p. 17] discrimination.

THE COURT: Okay. Any rebuttal?

MR. SCHMOLL: Not unless they're any questions from the court.

MR. HAMO: Likewise, judge, if you have any any questions.

THE COURT: I think I must dismiss the conspiracy claim, that is Count Two as I understand it, because these officers are being sued in their capacity, their official capacity as officers and representatives of the municipality. And two agents of the same corporate entity may not conspire with each other, they are part of the same single unit.

However, I'm going to deny the motion on qualified immunity as applied to Counts One and Four.

None of the cases cited by the movant are applicable to the facts of this case in which the plaintiff, Mr. Davis, was taken into custody.

And all of the standards of *DuChaney* were met. The special relationship was established which required that the officers provide for his safety thereafter.

He was taken into custody and they were instructed specifically to release him if he's not a danger to himself; and he clearly was, because after release, the evidence is undisputed that he was drunk.

[p. 18] The eye witness said he was drunk and the objective testing has told us that he was drunk and,

therefore, incompetent. He was not even competent as the facts bore out to seek help appropriately.

He rejected help that might have saved him because of his incompetence. And the custody these officers put him in was the cause of the entire resulting injuries, because once they established the special relationship, they put him in very serious danger and abandoned him there.

They simply didn't release him at the door of the headquarters or back in the city or failed to take him up when they saw him drunk in the street.

They took him and placed him in a much more serious condition in the dark, on the country road with a high-speed limit and abandoned him there. That was an abuse of the special relationship they had established.

And they were – if that requirement is required, deliberately indifferent to his needs in placing him in this extreme jeopardy, when they knew he was not competent to fend for himself in this new position that they selected for him.

So their responsibility is clearly established by the law and they may not enjoy a qualified immunity for their activities. And those counts can't be dismissed.

[p. 19] So please prepare an order.

MR. HAMO: I will be happy to do that, judge.

(This hearing concluded at 2:45 p.m.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STEVERSON DAVIS,

Plaintiff,

v.

CIVIL ACTION
NO. 95-CV-71435-DT

PATRICK BRADY and
SHAWN MURPHY,
jointly and severally

Defendants.

_____/

DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

BEFORE THE HONORABLE ANNA DIGGS TAYLOR
United States District Judge
738 US Courthouse & Federal Building
231 Lafayette Boulevard West
Detroit, Michigan
Monday, January 8, 1996
(Filed May 9, 1997)

APPEARANCES:

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In behalf of Plaintiff.

FREDERICK SCHMOLL, III ESQ.,
10th Floor Northbank Center
432 North Saginaw Street
Flint, MI 48502
In behalf of Defendants.

* * *

[p. 22] made, but there isn't one being made. It's got absolutely nothing to do with these officers, whether they were disciplined or not disciplined by the City of Flint.

And, lastly, the Sixth Circuit *Walton* case, I mean if we're talking about leaving someone in a position of danger, in the *Walton* case, we had two minors were left unattended because their parent was taken into custody.

THE COURT: Were they arrested?

MR. SCHMOLL: The parent was, the two minors weren't.

THE COURT: They weren't.

MR. SCHMOLL: And in *DeShaney*, we had young Joshua who had been in custody of the state and was returned to an abusive parent.

So if the argument is simply that there's some heightened standard if an individual had been at some time in custody, the Supreme Court in the United States *DeShaney* case says, no. It says it's not true because, yes, you did have young Joshua under state protection and you returned it to that parent. We have the same kind of analysis here, so we ask our motion be granted.

THE COURT: All right. Well, for the reasons briefed and argued by the plaintiff, the court must deny the request that qualified immunity be provided the defendants under the circumstances of this case.

[p. 23] It is, first of all, a case far different from any cited by the defense in their suggestion that qualified

immunity should be afforded them on the facts that the plaintiff describes and the court must assume will be presented at trial.

This man was under arrest and was, according to the testimony of witnesses, so drunk that he could not stand up when he was unhandcuffed and released from police custody on a dark country road, many miles from the urban sight of his arrest, on a two lane highway with a fairly high-speed limit.

There was no exigency that would justify the determination of the officers to abandon a person with obvious need under those circumstances.

The officers have taken the time to go pretty far, taken substantial amount of time to place him in the jeopardy they placed him. His circumstance was obvious.

If the facts are borne out at trial and those facts certainly constitute deliberate indifference and any reasonable officers under the circumstances should have been well aware that he was prohibited under his own doing from placing citizens dependent upon the paternal status of the state in such danger.

So the qualified immunity is denied and the motion for summary judgment is denied as well. Facts [p. 24] presented, at least according to the plaintiff's version, certainly would suggest that a case of deliberate indifference a prisoner's medical, physical human needs and egregious case of deliberate indifference or deliberate indifference had been made out in this case.

So the motion's denied.

MR. HAMO: Thank you very much. Your Honor. Would the court like me to draft an order?

THE COURT: Please, yes.

MR. HAMO: I will do so.

THE COURT: And, of course, inasmuch as discovery's not complete, the conspiracy claim will be denied without prejudice. The others are denied simply.

MR. HAMO: Thank you, judge.

(This hearing concluded at 11:47 a.m.)

96-2575

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEVERSON DAVIS,	)	
Plaintiff-Appellee,	)	
v.	)	ORDER
PATRICK BRADY AND SHAWN MURPHY,	)	(Filed Jun 29, 1998)
Defendants-Appellants.	)	

BEFORE: KEITH, SUHRHEINRICH, and DAUGHTREY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

STEVERSON DAVIS,

Plaintiff,

vs

PATRICK BRADY and SHAWN MURPHY, Jointly and Severally,

Defendants.

CIVIL NO: 95-71435

JUDGE: ANNA DIGGS TAYLOR

PLAINTIFF'S FIRST AMENDED COMPLAINT

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Plaintiff, through counsel, in support of his complaint states as follows:

1. This is an action for damages sustained by a citizens of the United States against police officers in the Flint Police Department.

JURISDICTION AND VENUE

2. This action is brought pursuant to 42 USC 1983, 1985, 1988 and the Fifth, and Fourteenth Amendments of the Constitution, and pendent state claims.

3. Jurisdiction is predicted [sic] upon 28 USC1331 (federal question), and 1343 (civil rights).

4. Venue is appropriate in this Court pursuant to 28 USC 1391 as all defendants reside and the claim arose in this district.

5. The amount in controversy exceeds the jurisdictional limit of this Court and further plaintiff requests a jury trial.

THE PARTIES

6. Plaintiff Steverson Davis is a resident of the City of Flint, Genesee County and a citizen of the United States.

7. At all relevant times, defendants Brady and Murphy were police officers employed by the City of Flint Police Department, and at all relevant times as set forth in this complaint acted in their capacities as employees of the City of Flint.

8. At all relevant times and in all their actions as set forth in this complaint, defendants acted under color of the state law and pursuant to their authority as police personnel employed by the City of Flint.

FACTUAL ALLEGATIONS

9. On November 17, 1994, Steverson Davis was arrested by defendants for breaking three windows at the Carriage Town Mission. Steverson Davis was intoxicated at the time of his arrest for disorderly person.

10. Defendants transported Davis to the City of Flint Police Department, where he was fingerprinted and booked, then transported him to the Genesee County Jail. They were not permitted to lodge him at the County Jail because of overcrowding. He was released pending further investigation (PFI).

11. Then, handcuffed in the back of the cruiser, defendants took him in their police vehicle to Bray Road in Genesee Township, opened the back door of the cruiser, pulled him out of the back seat, threw him on the ground, still handcuffed, then placed a foot against his face thereby holding his face against the ground, removed the handcuffs and stated for him to find his own way back to Flint even though defendants knew that Steverson Davis was intoxicated and that the Bray Road area was unfamiliar to him and unlighted.

12. Defendants then proceeded to depart in their police vehicle, leaving Steverson Davis in an intoxicated state in the unfamiliar, unlit area.

13. Steverson Davis knocked on two private residences to use a phone and, not being able to, began to walk in his intoxicated state.

14. A Genesee Township police officer was summoned to the area because of a 911 call from one of the above residents, and after talking with Steverson Davis

for a very short time, concluded that Steverson Davis had broken no laws and was not subject to arrest by this officer, and thereby left the scene.

15. Within a few minutes, still walking and still intoxicated, Steverson Davis was hit by a vehicle, suffering severe and permanent damages.

16. As a result of the actions of defendants, Steverson Davis suffered, and continues to suffer, extreme pain, humiliation, emotional and psychological distress, fear, amputation, paralyzation and permanent lifetime physical and emotional damages.

COUNT I
VIOLATION OF 42 USC 1983

17. Plaintiff incorporates all paragraphs in this complaint into this count except for Counts V and VI.

18. By reason of their acts as set forth in this complaint, defendants acted under color of State law and with malice to subject Steverson Davis to the deprivation of his rights, privileges and immunities secured by the Constitution and laws, including, but not limited to:

A. Steverson Davis' right not to be deprived of life, liberty or property without due process of law, as secured by the Fifth and Fourteenth Amendments of the Constitution;

B. Steverson Davis' right to be guaranteed equal protection of the laws, as provided by the Fourteenth Amendment to the Constitution;

COUNT II
VIOLATION OF 42 USC 1985

19. Plaintiff incorporates all paragraphs in this complaint into this count except for Counts V and VI.

20. The defendant officers conspired and committed malicious acts in furtherance of their conspiracy to deprive Steverson Davis of his right to equal protection under the law, injured him and deprived him of rights and privileges of citizens of the United States, in part selecting him because he is black.

21. Defendants conspired and committed acts in furtherance of a conspiracy to cover-up the police misconduct, depriving Steverson Davis of his rights under the Constitution, including his right to bring a civil action for redress of their malicious and hateful acts.

22. The defendants acted in furtherance of their conspiracy by engaging in one or more of the following acts:

A. Improperly transporting and leaving the seriously intoxicated Steverson Davis in an area that was unknown to him, unlit and perilous;

B. Physically throwing Steverson Davis, while he was seriously intoxicated, onto the ground, holding his face down against the ground with a police issued boot, then leaving him in a risky and precarious situation stating to him to find his own way back to Flint;

C. Failing to adhere to the proper police standards of care as set forth in the customs and policies of police procedure not only within the City of Flint but also nationwide including treatment of persons in custody;

D. Failing to report the accurate and correct version of this incident;

E. Denying the accurate and correct version of this incident;

F. Assisting in the cover-up of this serious police misconduct.

23. By reason of the conduct as set forth in this count, Steverson Davis suffered damages as set forth in paragraph 16 which are included here by reference.

WHEREFORE, Steverson Davis respectfully requests judgment against the defendants for their violations of 42 USC 1983 and 1985(3) in an amount in excess of the jurisdictional amount of this Court, along with exemplary damages, as well as attorney's fees under 42 USC 1988, and costs and interest thereon.

COUNT III
ASSAULT AND BATTERY

24. Plaintiff incorporates all paragraphs in this complaint into this count except paragraphs 17 and 18.

25. At all relevant times as set forth in this complaint, the defendants acted within the course and scope of their employment with the City of Flint Police Department, and within the apparent scope of their agency as agents of the City of Flint Police Department.

26. The physical manhandling of Steverson Davis as described previously in this complaint constitute an assault and battery which was committed without provocation, privilege or justification, and Steverson suffered

injuries, fear, humiliation and mental anguish as a result of that battery.

27. Steverson Davis was repeatedly made to suffer apprehension of further physical injuries and intimidation by defendants.

COUNT IV
SPECIAL RELATIONSHIPS

28. Plaintiff incorporates all paragraphs in this complaint into this count.

29. At all relevant times as set forth in this complaint, defendants acted within the course and scope of their employment with the City of Flint Police Department and within the apparent scope of their agency as agents of the City of Flint Police Department.

30. Once defendants had custody and control of Steverson Davis, they owed him the duty of reasonable care and protection because of the special relationship between the officers and Steverson Davis as their detainee.

31. Defendants breached their duty of reasonable care and protection by:

A. Assaulting Steverson Davis;

B. Battering Steverson Davis;

C. Placing Steverson Davis in a position of danger that he would not otherwise have been in but for the actions of the defendants.

32. Defendants acted with deliberate indiffence [sic] to the rights, care and protection of Steverson Davis

while he was in the custody, care and control of defendants.

33. As a direct and proximate result of the actions of defendants, Steverson Davis suffered damages as outlined in paragraph 16 of this complaint.

COUNT V
GROSS NEGLIGENCE

34. Plaintiff incorporates all paragraphs in this complaint into this count except paragraphs 17 and 18.

35. While exercising control, custody and care over Steverson Davis, defendants had a duty to act without gross negligence.

36. By reason of their acts as set forth previously in this complaint and incorporated into this count, defendant's conduct was so reckless that it demonstrated a substantial lack of concern for whether an injury resulted to Steverson Davis.

37. As a direct and proximate result of the defendant's breach of this duty, Steverson Davis was severely injured as set forth in paragraph 16 of this complaint in an incorporated area.

COUNT VI
WANTON AND WILFUL MISCONDUCT

38. Plaintiff incorporates all paragraphs in this complaint into this count except paragraphs 17 and 18.

39. Defendants acted with deliberate indiffence [sic] to the rights, care and protection of Steverson Davis

while he was in the custody, care and control of defendants.

40. While exercising care, custody and control over Steverson Davis who was a detainee of defendants, defendants had an obligation to not act in a wanton and willful manner.

41. Contrary to the above duty, defendants actions as set forth in this complaint showed an intent to harm Steverson Davis or an indifference as to whether harm would result to Steverson Davis.

42. Further, defendants knew that the situation involving Steverson Davis required the exercise of ordinary care and diligence to avert injury to Steverson Davis and defendants had the ability to avoid injury to Steverson Davis by exercising such care and diligence, but instead chose the course of conduct that displayed an intent to harm Steverson Davis or at least an indifference to harm Steverson Davis equivalent to a willingness that harm to Steverson Davis occur.

43. As a direct and proximate result of the above, Steverson Davis was severally injured as set forth in paragraph 16 above.

GENERAL ALLEGATION

44. As applied to all counts in this complaint, defendant's actions constituted a deliberate indifferrence [sic] and reckless disregard to Steverson Davis' rights, both Federal and State, as well as his care and protection, and defendants actions displayed a failure to act when the need to do so was obvious.

WHEREFORE, Plaintiff Steverson Davis respectfully requests judgment against the defendants, jointly and severally in an amount to which he is entitled, said amount to exceed the jurisdictional amount of this Court, with exemplary damages, attorneys fees pursuant to Federal and State laws, costs and interest, and any other further relief as the Court deems appropriate.

GEORGE R. HAMO & ASSOCIATES

/s/ George R. Hamo
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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEVERSON DAVIS,

Plaintiff - Defendant

vs

PATRICK BRADY and
SHAWN MURPHY

Defendants - Appellants

Court of Appeals
No: 96-2575

(Filed May 22, 1998)

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APPELLANTS' PETITION FOR REHEARING; SUGGESTION FOR REHEARING EN BANC

REQUIRED STATEMENTS FOR REHEARING EN BANC

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the United States Supreme Court and Court of Appeals for the Sixth Circuit, and that

consideration by the full Court is necessary to secure and maintain uniformity of decisions:

DeShaney v. Winnebago County Dept. of Soc. Servs., 485 U.S. 189 (1989).

Harlow v. Fitzgerald, 457 U.S. 800 (1982).

Anderson v. Creighton, 483 U.S. 635, 640 (1987).

Malley v. Briggs, 475 U.S. 335 (1986)

Martinez v. California, 444 U.S. 277 (1980).

Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997).

Foy v. City of Berea, 58 F.3d 227 (6th Cir. 1995).

Walton v. City of Southfield, 995 F.2d 1331 (6th Cir. 1993).

Hanan v. Trammell, 785 F.2d 557 (6th Cir. 1986).

Gazette v. Pontiac, 41 F.3d 1061 (6th Cir. 1994).

Long v. Norris, 929 F.2d 1111 (6th Cir. 1991).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1 Whether police officers have a duty to protect an individual from harm when they have not rendered the individual unable to care for himself?

2 Whether police officers have a duty to protect an intoxicated individual against injury once the individual is no longer in custody?

3 Whether intoxicated individuals had a clearly established Constitutional right, in

November 1994, not to be transported outside city limits after being arrested for public intoxication and disorderly conduct, when the local jails are too overcrowded to take them?

4 Whether it is possible for police officers to release intoxicated individuals without incurring a duty to protect the individual from subsequent harm?

5 Whether police officers can be held liable under § 1983 for events which are not causally related to their decision to release an intoxicated individual from custody?

INTRODUCTION

Petitioners seek a rehearing, and a rehearing en banc, of the panel's decision in *Davis v. Brady*, (No. 96-1575) (decided May 8, 1998) because the panel's opinion conflicts with existing United States Supreme Court and Sixth Circuit precedent, and because the panel wrongly decided several questions which are of exceptional importance.

The panel's decision grants greater Constitutional rights to intoxicated adults than the United States Supreme Court recognizes for children, imposes liability upon police officers who are faced with overcrowded jails which they are powerless to change, elevates a state tort to the status of a Constitutional violation, discourages police officers from arresting drunks, opens the floodgates to thousands of new lawsuits, and adopts the state created danger theory of recovery as the law of the Sixth

Circuit, without finding that the newly created right entitled the defendants to qualified immunity.

ARGUMENT

Whether police officers have a duty to protect an individual from harm when they have not rendered the individual unable to care for himself?

The panel held that the defendants had a duty to protect Davis because he had been in their custody and he was unable to care for himself. However, it is undisputed that Davis' inability to care for himself was due to his voluntary intoxication, not any actions by the officers. Accordingly, the panel's decision conflicts with *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 485 U.S. 189 (1989), which held that a duty to protect an individual against injury from other persons is only triggered when state actors restrain an individual's liberty and render the individual unable to care for himself, "through incarceration, Institutionalization, or other similar restraint of personal liberty." 485 U.S. at 200.

The effect of the panel's decision is to provide Davis, an adult who made a conscious choice to intoxicate himself, with more Constitutional rights than four year old Joshua DeShaney.

Whether police officers have a duty to protect an intoxicated individual against injury once the individual is no longer in custody?

The panel cited *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997), for the proposition that the duty to protect an individual against injury from other persons

continues after custody has been terminated. This contradicts *DeShaney* and *Stemler*. *DeShaney* found that the state had no duty to protect Joshua DeShaney from the injury that befell him because the harms [he] suffered did not occur while he was in the State's custody," even though they were foreseeable. *DeShaney*, 489 U.S. at 201. *Stemler* only held that the officers' duty to protect Black continued for as long as she was restrained and unable to care for herself, not that it continued after custody terminated. *Stemler*, 126 F.3d at 868.

Like *DeShaney*, *Stemler* focused on the restraint, and whether it rendered Black unable to care for herself, not simply "custody." The court stated that the officers "physically lifted [Black] out of Stemler's car and placed her in the truck against her will. In so doing, the officers took the 'affirmative act of restraining [Black's] freedom to act on her [own] behalf,' and consequently imposed upon themselves a duty to ensure that they were not placing her in danger." *Stemler*, 126 F.3d at 868.

The dispositive fact in *Stemler* was the act of placing Black into a vehicle driven by an abusive, intoxicated person, not whether Black was intoxicated. The danger to Black would have been the same whether she was intoxicated or not, because her inability to care for herself did not stem from her intoxication, but from the fact that she was confined to the dangerous vehicle until it stopped. The court stated that "Black was rendered unable to protect herself by virtue of both the threat of arrest and her physical placement in the truck by the officers." *Stemler*, 126 F.3d at 868. She "never had the opportunity to make a voluntary choice to continue driving with Kritis beyond the span of time that the police had in

effect ordered her to do so; her fatal accident occurred about five minutes after the truck left the police stop." *Id.*

The act of placing the decedent in the vehicle with a drunk driver was a restraint of personal liberty which was "similar" to incarceration and institutionalization, and it was this affirmative act of restraint which rendered her unable to care for herself. Thus, although custody ended once the decedent was in the vehicle, she was still restrained and unable to care for herself until the vehicle came to a stop. Davis, however, was not rendered unable to care for himself by being arrested and released. The panel should not have found a duty. To do so creates a new rule of law which is at odds with *Stemler.*

Whether intoxicated individuals had a clearly established Constitutional right, in November 1994, not to be transported outside city limits after being arrested for public intoxication and disorderly conduct, when the local jails are too overcrowded to take them?

The panel appears to have denied defendants' claim of qualified immunity, but never articulates the clearly established Constitutional right which is alleged to have been violated, and never explains why the officers should have been aware of the existence of this right in November 1994. This contradicts *Harlow v. Fitzgerald,* 457 U.S. 800 (1982); *Anderson v. Creighton,* 483 U.S. 635 (1987); *Malley v. Briggs,* 475 U.S. 335 (1986); *Long v. Norris,* 929 F.2d 1111 (6th Cir. 1991); *Foy v. City of Berea,* 58 F.3d 227 (6th Cir. 1995), and *Walton v. City of Southfield,* 995 F.2d 1331 (6th Cir. 1993).

Government officials performing discretionary functions are shielded from liability for civil damages unless

their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818-19. For a constitutional right to be clearly established, "the law must be clear in regard to the official's particular actions in the particular situation." *Long*, 929 F.2d at 1114. "[I]n the light of preexisting law the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640. Qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.' " *Foy*, 58 F.3d at 233 (quoting *Malley*, 475 U.S. at 341).

The panel refused to follow these Supreme Court decisions by failing to identify the particular right which has been violated. This is because the panel has articulated a new right which did not exist at the time the defendants took Davis outside of town. The panel adopts the "state created danger theory" for the first time in this circuit, and applies it retroactively to the defendants in violation of the rule of law established by *Harlow*, *Anderson*, *Malley* and *Long*. This is evident from the fact that the panel does not point to any specific decisions which demonstrate that there was a clearly established Constitutional right in November 1994, which would have put the officers on notice. Whether *Foy* or *Walton* support defendants' contention that there was no clearly established Constitutional right, they surely do not establish such a right.

The Sixth Circuit has never explicitly adopted the state created danger theory of liability in § 1983 cases. This circuit has always applied a pure *DeShaney*-custody analysis. Yet this panel applies the state created danger theory as if it were established law in this circuit, finding

that "the defendant officers in this case placed Davis in a more dangerous situation." In support of its application of the theory, the panel cites to *Gazette v. City of Pontiac*, 41 F.3d 1061 (6th Cir. 1994). However, *Stemler* clearly stated that the language in *Gazette* was "dicta." *Stemler*, 126 F.3d at 868. *Stemler* found it unnecessary to address the viability of the state created danger theory, refusing to "opine as to the circumstances under which a substantive due process claim in a non-custodial setting is possible." *Id.*

It is unclear, then, whether this panel has now adopted the state created danger theory, by way of a cite to *Gazette*, but the panel should be given an opportunity to clarify whether that was its intention. Furthermore, if this new theory is to be adopted, in such a controversial, hotly contested area of Constitutional law, the full court should be given an opportunity to decide whether it agrees with the new direction the panel is taking the court.

Whether it is possible for police officers to release intoxicated individuals without incurring a duty to protect the individual from subsequent harm?

This is a question of exceptional importance because the answer will have such a widespread impact on so many people. If the decision stands as it now reads, it will deter police officers from arresting drunks, it imposes a heavy burden upon police officers for circumstances beyond their control, it elevates a simple tort to Constitutional status, it cuts against the general policy of barring individuals from recovering in tort for injuries they received as a result of being intoxicated, and it

opens the floodgates to thousands of new lawsuits by intoxicated individuals who are injured after being released from police custody.

Police officers will choose not to arrest intoxicated individuals, rather than risk incurring § 1983 liability, because there is no way for officers to know when their duty ends once they take a drunk into custody. Despite the many criticisms leveled on the *DeShaney* opinion, the custody-restraint standard provides a meaningful, bright line rule to guide police officers. Under the panel's decision, officers face liability for subsequent injuries whether they release an intoxicated person at home, on the street, or at a detox center. Some drunks, like Davis, are homeless, but the officers do not have the resources to track down addresses. Some drunks, like Davis, will give false information, which the officers cannot afford to rely upon. Some drunks, like Davis, face a more dangerous situation at home than they do on the street. Yet officers would also face § 1983 liability if they attempted to retain custody of a drunk, like Davis, who wanted to be released, in order to protect the drunk against the dangers of the world.

This will have a negative impact on the health and safety of drunks, as well as the public at large. One of the reasons for public intoxication and disorderly conduct statutes is to protect violent drunks from themselves and from the people they anger. For example, Davis was in danger at the mission, because he had been shouting obscenities and breaking windows. In addition, the public has an interest in having the police protect them from drunks by arresting them and removing them.

In addition to the chilling effect the panel will produce upon police practice, the panel imposes a heavy and unfair burden upon police officers, who have no control over the availability of facilities to house drunks. The jails of the notion are overcrowded, and police officers should not bear the brunt of this problem. Furthermore, many communities lack a detox center, through no fault of the police force.

The panel elevates a simple tort, the alleged negligence of the police officers, into a Constitutional violation. This is poor judgment, as a matter public policy, but it also runs afoul of the clearly established maxim that the courts are hesitant to expand notions of substantive due process. *See* DeShaney, *generally*.

The law generally seeks to deter people from excessive drinking and public intoxication by denying them the right to recover for injuries sustained while drunk. For example, most states prohibit drunks from maintaining a tort action against furnisher of alcohol, whether it be dram shop, or social host. In addition, many states prohibit suits against the police for injuries sustained during a high speed chase if the victim was intoxicated. It is a long standing principle of the common law that intoxication is not a defense to a crime, for public policy reasons. This policy will be thwarted by the panel's holding.

Finally, the panel compels federal district court judges to incur the substantial burden of thousands of new lawsuits which this decision will attract.

Whether police officers can be held liable under § 1983 for events which are not causally

related to their decision to release an intoxicated individual from custody?

The United States Supreme Court and the Sixth Circuit have consistently refused to impose § 1983 liability, without even reaching the issue of whether state actors owed a duty or whether the duty was violated, when the causal connection between the state actions and the harm is tenuous. *Martinez v. California,* 444 U.S. 277, 285 (1980); *DeShaney* at n 4; *Janan v. Trammell,* 785 F.2d 557 (6th Cir. 1986); *Gazette v. Pontiac,* 41 f.3d 1061 (6th Cir. 1994). This panel conflicted with these precedents when it held defendants liable for an injury which befell Davis after he had reached a position of safety. The panel did not even discuss the causation issue, although defendants raised it in their brief on appeal. The panel requires that officers remain liable for harm to intoxicated persons who were once in their custody, without regard to what the individuals do once they leave custody. However, *Martinez* stated that the State had no duty to prevent the death of Martinez because it was "too remote a consequence of the parole officer's action to hold them responsible under federal civil rights law." *Martinez,* 444 U.S. 277 (1980).

In this case, it is undisputed that Davis safely navigated his way from the point where he was released to the Piccobotta home nearby, and had the opportunity to make a phone call for request help. He also stopped and spoke to officer Carlson, of the Genesee Township police department, after leaving the Piccobotta residence. By continuing to hold the officers liable for their decision to take Davis to Bray road, despite the fact that Davis put himself back into danger, the panel violates United States Supreme Court precedents.

CONCLUSION

Appellants therefore request that the panel grant their petition for a rehearing, on the basis of the above discussed errors and omissions, or in the alternative, that the court grant a rehearing en banc.

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/s/ Frederick L. Schmoll
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Dated: 5-21-98

MOTION FILED
NOV 19 1998

(2)

No. 98-534

In The

Supreme Court of the United States

October Term, 1998

PATRICK BRADY and SHAWN MURPHY,

Petitioners,

v.

STEVERSON DAVIS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY'S MOTION TO FILE AN AMICUS CURIAE BRIEF AND BRIEF IN SUPPORT

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MOTION

NOW COMES this Amicus Curiae Petitioner, The MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY, by and through its attorney, Marcia L. Howe of JOHNSON, ROSATI, LABARGE, ASELTYNE & FIELD, P.C., requests the opportunity to file an Amicus Curiae Brief as follows:

1. The Michigan Municipal Risk Management Authority (MMRMA), is a public entity self-insurance pool authorized by the statutes of the State of Michigan to provide risk management and the pooling of municipal monies for a self-insured program.

2. The MMRMA is a public entity, self-insured pool providing liability and property coverage to its membership of more than 250 Michigan local governmental units. Members include cities, counties, townships, villages, health-related services, facilities, departments and agencies, municipal authorities, boards, and commissions, libraries and library systems, fire departments, courts, transportation departments, and cable communication services.

3. The MMRMA membership consists of municipal entities with a total of over 5,500 police officers.

4. The MMRMA and its membership are greatly concerned about the erroneous, published decision issued by a panel of Judges of the Sixth Circuit Court of Appeals in *Davis v. Brady* because it imposes a tremendously burdensome and unfair duty upon police officers to insure the safety of intoxicated, homeless individuals *after* they are released from police custody to their own personal

recognizance. This decision suggests that if any intoxicated, homeless person is apprehended, then that unlucky law enforcement officer must provide protection and assistance until the state of intoxication has passed or their safety is insured after they are released from custody, which could possibly include a lengthy medical process.

5. This overburdensome and impossible duty conflicts with the individual police officer's legal duty to enforce the law and his legal obligation to intervene into disputes or disagreements, often involving intoxicated persons. This Court cannot possibly want to inhibit an officer's performance of this duty and obligation.

6. The MMRMA and its police officers are deeply concerned because this new development broadly expands the *constitutional* duties of protection and places the overwhelming social problem onto the shoulders of individual police officers. In doing so, this *Brady* opinion fails to clearly articulate the correct scope or standard of that duty except that it may be read to make *individual* police officers the guarantors and protectors for the ultimate safety of intoxicated, homeless persons apprehended for destructive or assaultive behavior. Thus, this Court's guidance is needed to consider and more clearly articulate the degree of the officer's obligation to a released, but homeless person. The scope of the duty must be readily measurable so that municipal entities and its employees can be guided as to what they MUST do to avoid the personal liability of a constitutional violation under such difficult and impossible circumstances.

7. The MMRMA and the police officers are concerned that the *Brady* decision has essentially converted what, at best, would be a state tort negligence action into the constitutional violation of major proportions. The impact of the *Brady* decision imposing an affirmative duty to protect an intoxicated, homeless person after they are released from custody is of vital importance to society. The judiciary is ill-equipped to develop federal common law to address this national social problem, which is the core of this complaint. Imputing society's failure to remedy *the* social problem of homeless, intoxicated individuals to the law enforcement officer is simply unfair and unconscionable.

8. Furthermore, the *Brady* decision erroneously found that these particular police officers were *not* entitled to qualified immunity. Currently, a conflict exists among the appellate circuits as to whether there is *new* substantive due process liberty interest and under what circumstance there is a duty for police officers to protect. Prior to *Brady*, the Sixth Circuit Court of Appeals had not addressed this issue. Likewise, at the time of the 1994 occurrence, this Court had not spoken on this particular issue of police misconduct under similar circumstances. Unquestionably, the published *Brady* decision is dramatic new law. This liberty right and attending duty to protect a homeless, intoxicated person after they are released was *not* clearly established for purposes of avoiding qualified immunity. Instead, the *Brady* decision incorrectly found that the right was clearly established allegedly based upon the Supreme Court decision in *DeShaney v. Winnebago Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L. Ed.2d 249 (1989) and a few appellate circuit courts'

recognition of a duty to protect in the "abandonment" cases. Yet, the Sixth Circuit misapplied the "clearly established" test and constitutional law. If the *Brady* test of "clearly established" is so lenient and so minimal, then this new test of what is "clearly established" abrogates qualified immunity for police officers.

WHEREFORE, the Michigan Municipal Risk Management Authority, and its membership respectfully requests that this Court grant its Motion to File an Amicus Curiae Brief, consider its arguments carefully, and reverse or vacate this *Brady* decision.

Respectfully submitted,

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A. The individual police officer does not owe a constitutional duty to a homeless, intoxicated person to protect him after they release him from the police vehicle because the officers did not increase the danger to this person, who resumed his freedom on the streets.

42 U.S.C. § 1983 is not a source of substantive rights, but merely provides a vehicle for vindicating established federal rights that are violated. *Albright v. Oliver*, 510 U.S.

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[1] The Respondent has not returned my phone calls regarding that party's consent to the filing of the Amicus Brief so a Motion to File the Amicus Brief has been filed. Counsel for a party did not author this brief in part or in whole. No person or entity, other than the *Michigan Municipal Risk Management Authority* financed the brief.

266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). It was only recently that substantive due process claims were considered in the context of employment cases, but recovery was permissible only in cases where the most egregious executive action has occurred. *Collins v. Harker Heights*, 503 U.S. 115, 129, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992).

This Amici suggests that the *Brady* decision improperly over-expanded the duties of police officers. Most importantly, it bestowed upon the intoxicated, homeless person a right to be affirmatively protected by the police officers whenever there is a prior custodial relationship between the officer and that person, which was impermissibly extended to include the time after the custodial environment had terminated. This Amici respectfully suggests that the Sixth Circuit was overly "intoxicated" by its opportunity to create law:

> The Common Law is the perfection of human reason, – just as alcohol is the perfection of sugar. The subtle spirit of the Common Law is reason double distilled, till what was wholesome and nutritive becomes rank poison. Reason is sweet and pleasant to the unsophisticated intellect; but this sublimated perversion of reason bewilders, and perplexes, and plunges its victims into mazes of error.
>
> The judge makes law, by extorting from precedents something which they do not contain. He extends his precedents, which were themselves the extension of others, till, by this accommodating principle, a whole system of law is built up without the authority or interference of the legislator. Robert Rantoul, *Oration at Scituate* (July 4, 1836), *in* Kermit L. Hall et al., *American Legal History* 317, 317-18 (1991), cited by Justice Scalia,

A Matter of Interpretation: Federal Courts and The Law, p. 10-11.

Amicus suggests that the Sixth Circuit has simply gone too far in imposing a duty to protect in this instance where these facts, which are akin to those in *DeShaney v. Winnebago Co. Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), mandate a decision in favor of the Officers in this case.

Furthermore, this new right conflicts directly with a police officer's duty to enforce the law. Justice Levin's dissent in the Michigan Supreme Court, *White v. Beasley*, 453 Mich. 308, 552 N.W.2d 1 (1996), cited this long recognized state authority:

> It shall be the duty of the police and night-watchmen and officers of the force under the direction of the mayor and chief of police, and in conformity with the ordinances of the city, and laws of the state, to suppress all riots, disturbances and breaches of the peace and to pursue and arrest any person fleeing from justice in any part of the state; to apprehend any and all persons in the act of committing any offense against the laws of the state, or the ordinances of the city, involving a breach of the peace, and to take the offender forthwith before the proper court or magistrate, to be dealt with for the offense; to make complaints to the proper officers and magistrates of any person known or believed by them to be guilty of the violation of the ordinances of the city, or the penal laws of the state; and at all times diligently and faithfully to enforce all such laws, ordinances and regulations for the preservation of good order and the public welfare as the council may

> ordain; and to serve all process directed or delivered to them for service, and for such purposes the chief of police, and every policeman and night watchman, shall have all the powers of constables, and may arrest upon view and without process, any person in the act of violating any ordinance of the city involving a breach of the peace, or of committing any crime against the laws of the state. The chief of police and any policeman may serve and execute all process in suits and proceedings for violations of the ordinances of the city, and also any other process which, by law, a constable may serve. M.C.L. § 92.4, M.S.A. § 5.1752 (emphasis added). See also, M.C.L.A. 752.11, M.S.A. 28.716 (101)[2]

In this matter, the Officers were called to investigate a call for assistance on the destruction of property at the Carriage House Mission, a shelter for the homeless. They could not avoid the duty although they are informed that an intoxicated person was causing the destruction of property. They received this call and *must* provide assistance. To arrive and do nothing to stop the destruction of private property would serve neither their statutory duty nor the public's wishes. Here, the only alternative to stop the destruction of the shelter's property was to remove the intoxicated, homeless person from that environment.

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[2] Any public official, appointed or elected, who is responsible for enforcing or upholding any law this date and who willfully and knowingly fails to uphold or enforce the law with the result that any person's legal rights are denied is guilty of a misdemeanor.

Rather than confront the officer's duty and obligation to enforce the law, the Sixth Circuit improvidently created this new right on the basis that, if the individual employee did have direct contact with the party, then that employee owed a duty not to subject him or her to danger *and* the officers must have acted in a sufficiently "culpable" manner to be liable under a substantive due process theory. *Stembler v. City of Florence*, 126 F.3d 856 (6 CA 1997), (Petition for Cert. filed February 11, 1998, No. 97.1376).

The Sixth Circuit failed to sufficiently distinguish the highly pertinent facts of *Stembler* from those relevant, uncontroverted facts of the instant case. The Sixth Circuit's opinion was based on the erroneous premise that these Officers increased the danger to the Plaintiff by releasing him or dropping him off near a park. Logically, where else could they take a homeless person? Surely, he could not go back to the shelter he attempted to destroy. The County jail did not have room to house him. The Officers simply opened a car door and released him into the streets. No matter where the Officers left Plaintiff, he would be subjected to the street, as he was prior to his apprehension.

These Officers did not create or increase the danger to this individual. These Officers did *not* cause Plaintiff to become homeless. The Officers did not provoke Plaintiff into destroying the Mission's property.[3] The Officers did not create the state of intoxication or the Respondent's

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[3] *County of Sacramento v. Lewis*, ___ U.S. ___, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)

destructive, abusive and assaultive behavior. They did not create the overcrowding at the Genessee County Jail nor refuse him incarceration, which is, in essence, his home for the night. Instead, the Officers fortuitously are called to face a potentially dangerous situation and are required by law to act. Thus, the Sixth Circuit's basis for establishing a special relationship is faulty because it premised its decision on the misconception that the Officers increased the danger to Respondent where, in fact, they merely returned him to his prior existence, albeit in a different location. The location did not increase the danger at all.

> Police officers, especially when faced with a potentially dangerous situation, must be given a wide degree of discretion in determining what type of action will best ensure the safety of the individuals involved and the general public, the cessation of unlawful conduct, and the apprehension of wrongdoers. The determination of what type of action to take, e.g., make an immediate arrest, pursue a suspect, issue a warning, await backup assistance, etc., is a discretionary-decisional act entitled to immunity. Once that decision has been made, however, the execution thereof must be performed in a proper manner, e.g., the arrest must be made without excessive force, the pursuit of the suspect must not be done negligently, the request for assistance must include reasonably accurate information, etc. Since plaintiffs merely alleged negligent performance of a discretionary-decisional act, summary judgment for the individual officers was properly granted. *Morse v. City of Mount Pleasant*, 160 Mich. App. 741, 748-749, 408 N.W.2d 541

(1987) Judge Sawyer's dissent, reversed in 431 Mich. 888 (1988).

In *Bogan v. Scott-Harris*, ___ U.S. ___, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998), this Court was hesitant to place individual municipal officials in positions of personal liability for fear of the effect of that liability upon the individual official trying to serve a public purpose. There, this Court extended absolute immunity, even in a civil rights discrimination claim, to avoid that consequence.

Likewise, it is naive and unfair for this Court to ignore the impact upon these individual Officers by the imposition of personal liability upon them in this circumstance where they are literally caught between a rock and a hard place. Mere allegations, personal liability, and this impossible working condition does impact these Officers personally and professionally. What can they do when the jail is overcrowded and the court prohibits the addition of other inmates, even if it is to protect him? The Sixth Circuit offered no guidance in that regard, but the implication is surely that the Officers should have avoided that impossible situation, avoided the obligation to enforce the law, and thus, avoided the attending responsibility for the intoxicated, homeless person. If society does not care about this homeless person, then why would the courts impose that burden upon the Officer, who had no choice but to apprehend and remove the Respondent from the scene. The affirmative right to governmental aid was not established in *DeShaney*. *Id*. Mere knowledge of a danger does not create an affirmative duty to protect, which arises only if an injury occurs while in custody or an affirmative act while in custody prevents the person

from acting on his own behalf. *DeShaney*, 489 U.S. at 200, 109 S. Ct at 1005-1006.

In the December 1994 case, *Gazette v. Pontiac*, 481 F.3d 1061 (6 CA 1994), the court defined the *DeShaney* duty as a "duty to protect [that] can arise in a noncustodial setting if the state does anything to render an individual more vulnerable to danger." *Id.* at 1065. Further, the court states that "*DeShaney* did not specify what actions of a state would render a person more vulnerable to danger, nor how much more vulnerable to danger a state must make a person before the person's due process was violated". In *Gazette*, the officers' lies of telling the family that they were investigating the missing person was not casually connected to the injury. The injury was too remote from the officers' failure to protect the plaintiff from criminal acts of third-parties. At best, such a claim constituted gross negligence, not a constitutional violation.

In *Brady*, nothing occurred while Plaintiff was in custody that prevented him from acting on his own behalf when he was released. He sustained his injury from a third-party **after** the Officers released him from their custody. His injury was unrelated to Respondent's location. Contrary to the *Brady* holding, these Officers did not create any danger in the situation. They merely placed him back into his prior environment.

In Michigan, the courts would not recognize a special relationship between the plaintiff police officer's estate and the Department of Corrections' officials for injuries sustained as a result of the escaped prisoners' actions of shooting the police officer to death. *Chivas v. Koehler*, 182

Mich. App. 467, 453 N.W.2d 264 (1990). Likewise, in *Harrison v. Director of Dept. of Corrections*, 194 Mich. App. 446, 487 N.W.2d 799 (1992), governmental officials did not have a special relationship with the plaintiff that was murdered by prisoner while on parole. See also *Massey v. Department of Corrections*, 182 Mich. App. 238, 451 N.W.2d 869 (1990)[4] If the state courts do not recognize a special relationship between the third-party injured by the prisoner after custody was terminated, then the federal court should not create a constitutional duty, which is owed to previously apprehended person for injuries he sustained after custody is terminated. These state and federal courts refused to extend the special relationship to circumstances where the injury sustained is too remotely connected to the officers' actions. Therefore, no special relationship can exist when the Officers' actions were nothing more than the Respondent's exit from the vehicle. Even if you assume *arguendo*, that the Officers required Respondent's exit, their actions were too remote from the subsequent injury of being hit by an automobile driven by a third-party. The Officers did not intend to harm. It was not readily identifiable that he would be endangered by merely ordering him to leave their vehicle. Officers must be entitled to unrestricted discretion to make such decisions.

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[4] In *Gazette v. Pontiac, supra*, the federal courts found no special relationship between the missing person's family and the officers that assured the family that they were investigating their relative's disappearance. No special relationship was found to exist, although the officers had direct contact with the family.

The *Brady* holding that the release of the Plaintiff at a park was bad police judgment, ignored the lack of causal connection between the park and this Respondent's injury. He was not injured by exposure to the elements by being left near or in a park. In fact, he had contact with at least two human beings immediately after he was released from the patrol vehicle. He was not injured in the park. Rather, he was hit by a car as he walked on a pubic street. Yet, the uncontroverted fact is that every homeless person is subjected to the streets, including Respondent before and after his arrest. The Sixth Circuit erred by expanding substantive due process protection based upon the faulty premise that his danger was enhanced by his release.

The extremely punitive nature of the imposition of this duty to protect was disproportionate to Officers' lack of culpability. This heavy burden inhibits available alternatives and unwisely expands the scope of a substantive due process claim to encompass a wide range of police misconduct instances, some which undoubtedly were not contemplated even by the *Brady* panel thereby creating another slippery slope for finding liability. Rather than the ill-prepared judiciary, the more wiser route is to allow the Legislature to exercise its problem-solving, fact-finding role before imposing liability. (See Christopher Gencks, *Rethinking Social Policy; Raised, Poverty and Underclass*, 150 (1992), which reviewed the declined work ethic evidenced by the growing, voluntary underclass. According to that study, the persons who did not work all day even though they were neither excused by disability or

enrollment from school rose from 12.3% in 1968 to 21.8% in 1997.)[5]

B. The *Brady* decision is wrong and must be vacated because it weakens plaintiffs' burden in a substantive due process claim to a standard of nothing more than the mere exercise of bad judgment, a standard equated more with negligence than the exercise of egregious, arbitrary governmental power.

In the quiet hindsight of a courtroom, the *Brady* court concluded that the Officers exercised poor judgment. Yet, the standard of "poor judgment" does not encompass the level of culpability that is necessary to establish a substantive due process claim. In *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), this Court precluded a due process claim where the prisoner merely complained that he had slipped and fell on a pillow left on the stairs by a guard. This Court stated that the "lack of care" by a state official did not justify a deprivation of

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[5] Jane Jacobs, *The Death and Life of Great American Cities* (1961). There, she states that a successful city district must permit the persons to remain personally safe and secure on the street among strangers. Any city that fails to provide that atmosphere is bound to be in trouble. "[V]isible, physical and social disruption is a signal that the mechanisms by which healthy neighborhoods maintain themselves are broken down. An area loses its capacity to solve even simply-minded problems, its character becomes suspect." Wesley G. Skogan, *Disorder and Decline: Crime in the Spiral of Decay in American Neighborhoods* (1990) p. 48. Police play an essential role in maintaining orderliness in the city streets. Jacobs, *Death and Life, supra* at 31-32.

the life, liberty or property provision of the Fourteenth Amendment. "The touchstone of due process is protection of the individual against arbitrary action of government". *Daniels, supra,* 474 U.S. at 332, 106 S.Ct. at 665. At that time, this Court correctly stated:

> We think that the actions of prison custodians in leaving a pillow on the prison stairs, or mislaying an inmate's property, are quite remote from the concerns just discussed. Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law.

In *Pearson v. Grand Blanc Twp,* 961 F.2d 1211 (6 CA 1992), the standard for a substantive due process claim in a property/zoning context was that the municipal must exhibit "extreme irrationality". Shortly before this incident, the Sixth Circuit, which chastised the exercise of poor judgment by an individual officer that abandoned a 2 year old and a 14 year old on the street after their grandmother was arrested. Yet, the court did not impose liability upon the officer, but fact, afforded that officer qualified immunity. *Walton v. Southfield,* 995 F.2d 1331, 1333 (6 CA 1993). Poor judgment cannot be the proper standard, only the most *egregious* abuse of power should be shocking to the judicial conscience. *Collins v. Harker Heights, supra.* Negligently inflicted harm cannot rise to the level of a constitutional deprivation. *Daniels v. Williams, supra,* 474 U.S. at 327, 331.

Here, the Officers inflicted no direct harm. These Officers intended no harm at all. The injury to this Plaintiff was too remote from the Officers' actions. The Officers' culpability is too minimal to warrant the over broad expansion of the substantive due process protection in this instance. The facts of this case, as Petitioner points out, are more akin to the facts in *Foy v. City of Berea*, 58 F.3d 227, 231 (6 CA 1995). Essentially, the *Foy* decision held that the injury was too remote and the allegations were nothing more than gross negligence. There, the intoxicated young men were severely injured in a car accident after the officers ordered them to leave in their vehicle.

Likewise, Michigan Supreme Court has considered this exact dilemma for a police officer in both state and federal claims. The mid-level appellate court in *Williams v. Thompson*, 169 Mich. App. 843, 426 N.W.2d 417 (1988), concluded that a question of material fact existed as to whether police officers *should* have taken action to take an intoxicated driver into protective custody under M.C.L. 331.6501(I), M.S.A. 14.15 (6501)(I). The Michigan Supreme Court preemptively reversed in *Williams v. Thompson*, 434 Mich. 857, 415 N.W.2d 368 (1990) because the Supreme Court refused to impose tort liability and acknowledged an officers' need to exercise their discretion when determining the right action to take upon discovering an individual that might or might not be incapacitated. It is easy only in hindsight to determine that a particular person is incapacitated.

Similarly, in *Trimper v. Headapohl*, 162 Mich. App. 320, 327, 412 N.W.2d 731 (1987), reversed 434 Mich. 858, 450 N.W.2d 559 (1990), the officers had responded to a call of a "man down", which meant that he was lying intoxicated in the street. After returning him to his apartment building, they left him in the vestibule. Apparently, he later spent seventeen days in the hospital due to his injuries he had incurred. Notwithstanding the officers' knowledge of the man's predicament and their affirmative acts of placing him in the vestibule, the Michigan Supreme Court reversed and held that the decision to take or not take this person to the hospital was protected by this State's governmental immunity act against tort liability. M.C.L 691.1401, M.S.A. 3.996(101).

Most notably, the Michigan Court of Appeals in *Trimper* specifically declined a constitutional claim stating that:

> "Headapohl's and Yaklin's failure to provide medical care to plaintiffs was, at most, mere negligence and not a denial of constitutional rights. Ordinary negligence alone will not support a 42 U.S.C. 1983 claim. See *Daniels v. Williams*, 474 U.S. 327, 106 S Ct. 662, 88 L.Ed.2d 662 (1986)"

Thus, Michigan law embraced an individual officer's need for broad latitude in the exercise of their decision-making, discretionary powers. In *Trimper* and *Thompson*, the appellate courts declined to expand the constitutional protections to circumstances strikingly similar to the circumstances in the instant case. The only factual difference between Respondent and the plaintiffs in *Trimper* and *Thompson* is that Respondent was homeless. Notably

though, in each case the individuals are not injured because of WHERE they are released, but by the mere fact that they ARE released and unbeknownst to the officers, who are not medical experts, severely at an alleged risk due to the extreme nature of their state of intoxication or an unknown medical risk.

Thus, the state court found no viable state tort claim or constitutional claim and recognized that such allegations were tantamount to allegations of negligence. Federal constitutional jurisprudence should not expand federal protections and duties to create liability under the guise of a substantive due process claim for mere negligence or gross negligence. The *Brady* decision was wrong because it applied a deliberate indifference standard and because it watered down the substantive due process standard to little more than, at best, extremely bad judgment.

These circumstances do not, unfortunately or not, shock the conscience of our society because the homeless, intoxicated person, willingly or otherwise, is left to fend for him or herself. Rather than legislatively face this dilemma, the judiciary created the moral and legal obligation for an individual officer to insure the safety of a homeless, intoxicated person. The *Brady* decision reflects how the judiciary is too ill-equipped and uninformed about the underlying social problem to offer a wise, proper analysis. Instead, it is judicial lawmaking that is offensive to the protection of the separation of the powers. This opinion is merely a substitution by a judge in hindsight as to what he would have done in that circumstance. It is clear overreaching by the court.

If however, this Court chooses to recognize a substantive due process in this context, then this Court must carefully particularize the right and define the parameters of the required protection. At a minimum, the *Brady* decision must be remanded for more specific guidance to direct these Officers, and all law enforcement officers, to the particular parameters of the right and their duty when releasing homeless, intoxicated persons. Officers must be informed of their viable alternatives and a constitutionally acceptable method of determining, while working the streets, just how intoxicated or incapacitated a particular individual would have to be before they must protect them from themselves, while balancing the civil rights of persons using public highways or sidewalks. Simply, the Sixth Circuit's analysis was too shallow and improperly extended the duty to protect.

This Court must undo any impact of the published decision of *Brady* because it unwisely sets a standard that would make the police officers the insurers of the individuals apprehended, even after they are no longer in custody. The broad application of such a lenient standard cannot be overlooked or minimized by this Court for the sake of "waiting" until a number of federal appellate circuits have made decisions on the substantive due process claim analysis. Police officers, and even litigants, should not lose this Court's consideration because this Court considers the issue insufficiently developed by the appellate circuit courts. At a minimum, the result of the *Brady* decision is so egregiously wrong and inconsistent with *DeShaney* that it deserves vacation until a better standard or more thoughtful analysis can be considered, if only by this same appellate court. The *Brady* decision

cannot remain viable or implicitly viable until a "better" case comes along.

C. In November 1994, no substantive due process right to protect and guarantee the safety of an intoxicated, homeless person from being hit by a third-party's automobile after his release was established such that the officers would have known that their particular actions in this particular situation deprived the plaintiff of his liberty right under the U.S. Constitution.

In *Walton v. Southfield, supra* at 1336, the court protected the officers with qualified immunity because the question of "whether the abandonment of a minor by police could be a constitutional violation of the liberty interest in personal security" had not yet been clearly established. The 1993 *Walton* decision did not recognize such a right. The *Walton* court did, however, articulate the recognized test for determining whether a right was clearly established by looking "first to decisions of this court and other courts within our circuit, and finally to decisions of other circuits." *Walton*, 996 F.2d at 1336. The *Brady* court did not follow that test.

In discussing the imposition of liability under either a special relationship or increasing the danger theory, the court in *Walton* set forth in numerous cases throughout the circuits reaching inapposite results. These same cases are still good law today in most of their circuits. No definitive answer from this Court, the Sixth Circuit or many other circuit courts has been pronounced on this issue. Undisputedly, no case has been decided with these same facts in any one of the circuits. In fact, the State law

held to the contrary of *Brady*. Thus, this new substantive due process right and its attending "absolute" protection and duty was *not* clearly established in 1994 when this incident occurred.

The *Brady* court relied upon *Stembler v. City of Florence, supra*. There, the court found that a duty to protect did exist because the plaintiff, while in custody, was exposed to the police officers' affirmative act of physically placing the plaintiff, against her will, into a vehicle with her assailant and informing that she must remain in the vehicle or be subject to arrest. She was forced to be imprisoned in the vehicle with her assailant. In reality, *Stembler* supports Petitioner's argument because these Officers did *not* restrain Respondent from acting on his own behalf. Instead, it was merely a failure by these Officers to act on behalf of Respondent.

In addition to being factually distinguishable from *Stembler*, this case shows no such right was established as late as 1997. The 1997 *Stembler* decision was a novel step for the Sixth Circuit, even if this Court does not believe that it improvidently extended the duties of law enforcement agents to protect. On that basis alone, summary judgment was required in this case because no prior precedent addressed the facts in the *Brady* decision. It was only recently that this Court considered the substantive due process right to be safe in the employment situation in *U.S. v. Lanier* 520 U.S. 259, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997). Thus, the *Stembler* case and the *Lanier* case, which were not decided until 1997 and long after the incidents in the *Brady* decision had occurred, cannot be the measuring stick for whether the right or duty was "clearly established" in 1994.

The *Brady* court glossed over the lack of clearly established precedent as easily as it glossed over its reduced burden requiring only deliberate indifference that amounted to nothing more than a showing of poor judgment, at best, and gross negligence at the worse. This Court needs to vacate and reverse the *Brady* decision, or, at a minimum, remand it with instructions to provide a more particularized definition of the right and the extent of the duties. A failure to do so will result in the possible conclusion that, once a law enforcement officer in the Midwest takes any intoxicated, homeless person into custody, then this officer cannot release that person unless that officer can guarantee that, after the person's release, he will not be subject to any injury. Such a result cannot be the law under any test, whether classified as deliberate indifference or shocks the conscious. The Constitution should not be interpreted to place police officers in the position of insuring the safety of intoxicated, homeless persons after their release back into society and onto the streets.

In conclusion, police officers are not medical experts or technicians. Police officers are not social workers or psychologists. Most importantly, police officers are not mind readers that can guess what appellate court judges will conclude that they should have done to meet their constitutional obligations where there is nothing in any preceding and pertinent court decision informing them of that duty. The Sixth Circuit Court of Appeals decision is clearly erroneous and its precedent must be vacated to allow for a better reasoned opinion, which at a minimum

accepts the lack of clearly established precedent on this particular issue at the time of this incident.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1998

PATRICK BRADY and SHAWN MURPHY,

Petitioners,

v.

STEVERSON DAVIS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTION PRESENTED

Did the Petitioner-police officers violate Respondent Davis's due process rights when, in order to teach him a lesson after arresting him one night, they handcuffed him and drove him against his will while he was still in custody through the city of Flint to an unfamiliar and dark stretch of busy highway where the speed limit was 55 m.p.h., and which was miles from the police station, where they released him although they knew he was so intoxicated that his perception was impaired, he was staggering and he could hardly stand up; and then left him on that dark highway where he was struck by a vehicle and seriously injured?

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OPINION BELOW

The decision of the United States Court of Appeals for the Sixth Circuit in this case is reported as *Davis v. Brady*, 143 F.3d 1021 (6th Cir. 1998), and is reproduced in the Appendix to the Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 8, 1997, and the Petition for Rehearing was denied on June 29, 1998. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 (1996)

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

> State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

Petitioners, police officers Patrick Brady and Shawn Murphy, seek review of the Sixth Circuit's affirmance of the district court's denial of summary judgment on qualified immunity grounds. The plaintiff and Respondent, Steverson Davis, filed suit for violations of his civil rights under 42 U.S.C. § 1983. Davis alleged that the defendants violated his substantive due process rights by placing him at risk of harm when they abandoned him while he was in custody in an inebriated condition on an unfamiliar highway. The district court found that the record presented a claim sufficient to defeat summary judgment, including the establishment of a duty not to subject Davis to danger, and that the defendant officers acted with deliberate indifference to the threat of injury to Davis. The Sixth Circuit affirmed, and the defendant officers have filed a petition for a writ of certiorari.

One evening, Davis attempted to enter the Carriage Town Mission in Flint, where he had been living. The

mission staff refused him entry due to his inebriated condition; Davis had consumed a substantial amount of Thunderbird wine and a half-pint of vodka. Davis became violent and broke some of the mission's windows. The mission staff called the police. (Sixth Circuit Opinion ("Opinion"), App. 2a).

In response, officers Murphy and Brady (Petitioners) came to the mission, where they arrested Davis at 6:48 that evening. Petitioners then took Davis to the Flint, Michigan police station. Later, Davis was transferred to the county jail, but that facility was full. The desk sergeant then instructed Officers Murphy and Brady to "release Davis at the county jail if he was not so drunk that he would be a hazard to himself." No permission to transport Davis was requested by the officers, and none was given by their sergeant. Instead of following their instructions, however, the officers handcuffed Davis and placed him back in the squad car. (Opinion, App. 2a-3a).

With Davis handcuffed in the back seat, Petitioners drove through the city of Flint to Bray Road in Genesee Township, which was located outside the city limits of Flint. There, they made Davis get out of the squad car at the entrance to Bluebell Beach. Bray Road is a 55-mile-per-hour speed limit area, with few street lights and no sidewalk. The officers contend that they took Davis to this location and released him there at Davis' request, but Davis denies making such a request. Instead, Davis maintains that the officers brought him to Genesee Township to "teach [him] a lesson." In his account of the situation, the officers threw him out of the car, forced him to the ground, took off his handcuffs while one officer's boots were pressed against face, called him a "smart ass," and

told him to find his own way back into the city. (*Id.* at 3a; Steverson Davis Dep. at 49-56).

Petitioners' position is that Davis was sober when they released him on Bray Road, but the parties stipulated below that Davis' blood alcohol level was still .176 at 10:00 p.m., when he arrived at the hospital after the accident. A toxicologist testified that at the time Davis was released on Bray Road, his blood alcohol would have been between .191 and .206, and that at that level, he would have shown signs of perception impairment, disorientation, confusion, and lack of coordination. (Opinion at 4a). In addition, other witnesses who saw Davis on Bray Road after Petitioners left testified that Davis was staggering, slurring his words, seemed drunk, and could hardly stand up. (*Id.* at 3a).

After Petitioners left, Davis headed for some nearby houses, where he asked one of the residents to call the police. Genesee Township Police Officer Bruce Carlson responded to the call at 9:03 p.m., arriving on the scene at 9:06 p.m., found Davis at 9:10 p.m., and cleared the call at 9:12 p.m. (Ex. 2 to Deposition of Bruce Carlson Dep. Ex. 2.) According to Officer Carlson, he offered to give Davis a ride or to call someone for him, suggesting an ambulance, a taxi, and a friend or relative. Officer Carlson insists that Davis rejected assistance, calling him "just another damn white officer." (Opinion, App. 3a.) In contrast, Davis maintains that he asked Officer Carlson for a ride back to Flint and that Carlson refused. Officer Carlson testified that he did not have sufficient contact during this time to ascertain whether Davis was drunk, their conversation having occurred while Carlson remained in his cruiser, and Davis outside on the passenger side. (*Id.*

at 3a.) Carlson testified that other Flint officers had dropped off people in his jurisdiction in the past. (Carlson Dep. 16, Court of Appeals R. 171.)

Officer Carlson left at 9:12 p.m., and Davis was hit by a car approximately seven minutes later, sustaining serious permanent injuries. One of his legs was amputated, and he is now a semi-quadriplegic. (Opinion, App. 3a.)

REASONS WHY THE PETITION SHOULD BE DENIED

Summary

Petitioners base their Petition for Certiorari on the contention that the decision of the Sixth Circuit in this case conflicts with this Court's holding in *County of Sacramento v. Lewis*, 118 S. Ct. 1708 (1998), and with the Seventh Circuit's holding in *Estate of Stevens v. City of Green Bay*, 105 F.3d 1169 (7th Cir. 1997). Petitioners are wrong on both counts, however, for neither of those cases involved an in-custody prisoner who was moved against his will to a place of danger and deliberately left there as a form of punishment. The circuit court's ruling in this case is in keeping with this Court's jurisprudence, as announced in *Lewis* and cases such as *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989), and is consistent with the approach taken in other circuits in cases such as *Armstrong v. Squadrito*, 152 F.3d 564 (7th Cir. 1998), and *Santamorena v. Georgia Military College*, 147 F.3d 1337 (11th Cir. 1998). Moreover, Petitioners misstate the issues in their Questions Presented, and their statement of Reasons for Granting Certiorari is fatally flawed,

because in both instances Petitioners have ignored the facts that support Davis' case. Instead, Petitioners rely exclusively upon their own version of events, although they seek review of an order denying their motion for summary judgment. *Cf.* Fed. R. Civ. P. 56(c).[1] As is explained more fully in the Sixth Circuit Opinion (App. 5a-12a), and in this Brief, when the disputed factual issues are viewed in the light most favorable to Davis, there is no doubt that the courts below correctly ruled against Petitioners' summary judgment motion.

1. The Circuit Court Opinion Does Not Conflict With the Rules of Substantive Due Process Announced in *Lewis* and *DeShaney*.

Petitioners argue that the Sixth Circuit Court of Appeals misapplied *DeShaney* as well as this Court's recent ruling in *Lewis* when it held that the defendant police officers in this case were not entitled to summary judgment on the basis of official immunity. (Pet. 23-26.) However, Petitioners have misconstrued the circuit court's holding in this case and recited their version of the facts as though they were undisputed. Moreover, Petitioners ignore the essential differences between *Lewis* and cases such as this one, where the officers had ample time to deliberate before choosing their course of action, there were no countervailing safety concerns, and the officers' actions moved an unwilling, custodial subject

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[1] Petitioners purport to "reserve the right to argue Question 3" although they specifically do not seek certiorari on this question. (Pet. i.) Pursuant to Supreme Court Rule 14(a) Question 3 is not properly before this Court.

from a place of relative safety to a place of extreme danger. Finally, Petitioners' expressed purpose, that of teaching Davis a lesson, smacks of imposing punishment without benefit of a trial. (*See* Opinion, App. 5a.)

Petitioners argue that *Lewis* adopted a one-size-fits-all approach to the analysis of substantive due process denials. According to Petitioners, unless the court recites the magic phrase, "shocks the conscience," its holding is automatically inconsistent with *Lewis*. (*See* Pet. 13-15.) But *Lewis* did not adopt such an inflexible standard, nor does *Lewis* reject the "deliberate indifference" standard for cases such as this one. (*See* Pet. 14-15.) Instead, this Court said that due process rules are not "subject to mechanical application." 118 S. Ct. at 1718. In situations such as *Lewis* "where unforeseen circumstances demand an instant judgment on the part of an officer who feels the pulls of competing obligations, only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the shocks-the-conscience test." *Id.* at 1711. In that case, there was no time for deliberation and choosing between alternative courses of action. *Id.* at 1718. Moreover, the suspect the officer was chasing deliberately chose to speed through the streets, flouting police authority to control traffic. The defendant officer had done nothing to cause the situation that placed the plaintiff at risk, beyond refusing to stop the chase. *Id.* at 1711.

Here, unlike the officer in *Lewis*, Petitioners had ample time for reflection and deliberation before they acted, and there were no competing public safety concerns that impelled Petitioners to force Davis out of their patrol car on a dark and unfamiliar highway miles from the police station.

This Court was careful to distinguish the case before it in *Lewis* from situations such as this one:

> As the very term "deliberate indifference" implies, the standard is sensibly employed only when actual deliberation is practical, *see Whitley v. Albers*, 475 U.S., at 320, 106 S.Ct., at 1084-1085, and in the custodial situation of a prison, forethought about an inmate's welfare is not only feasible but obligatory under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare.

Id. at 1719 (footnote omitted). Accordingly, the "deliberate indifference" standard is the appropriate gauge of due process violations in situations where government officials "apparently acted with full appreciation of . . . the brutality of their acts," *id.* at 1718 (citing *Rochin v. California*, 342 U.S. 165 (1952)), or where the basic medical needs of a prisoner or detainee were not being met, *id.* at 1711, 1719 (citing *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239 (1983), and *Whitley v. Albers*, 475 U.S. 312, 320 (1986)).

No constitutionally mandated duty of care arose in *Lewis*, because the suspect was not in custody. Instead, *Lewis* involved a high-speed chase by an officer who was attempting to apprehend a suspect. Here, however, Petitioners' treatment of Davis occurred in the "markedly different circumstances of normal pretrial custody." *Id.* at 1719. A long line of this Court's decisions illustrates that the court of appeals was correct in finding that the Constitution does impose a duty of care in such circumstances. The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or

from its expressions of intent to help him or her, but from the limitation that the State has imposed on the individual's freedom to act on his or her own behalf. *DeShaney*, 489 U.S. at 200. *See also Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (Eighth Amendment requires the State to provide adequate medical care to incarcerated prisoners); *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) (substantive due process requires the State to provide involuntarily committed mental patients services necessary to ensure their "reasonable safety" from themselves and others.); *City of Revere*, 463 U.S. at 244 (Due Process Clause requires the responsible government or governmental agency to provide medical care to suspects in police custody who have been injured while being apprehended by the police). These cases and their analyses of the responsibilities owed to prisoners and detainees were expressly approved in *Lewis*. 118 S. Ct. at 1718-19.

The line of cases which includes *Estelle*, *Youngberg* and *City of Revere* imposes a constitutional duty on state officials to act in order to protect persons held in custody or detained. A fortiori, the Petitioners were under a duty to refrain from affirmative acts that moved their detainee from a place of relative safety and abandoned him against his will on a dark, unfamiliar and dangerous highway. (*See* Opinion, App. 9a-10a.) Petitioners' suggestion that *Lewis* has somehow changed these well-established precepts of substantive due process does not withstand scrutiny.

Finally, Petitioners badly miss the mark with their assertion that the Sixth Circuit has set the constitutional bar too low in substantive due process cases. (*See* Pet. 17.) Petitioners maintain that the court of appeals applied a

"gross negligence" standard in determining whether they were entitled to summary judgment on their defense of qualified immunity, (*id.*), but Petitioners are simply wrong. Instead, the circuit court properly applied the deliberate indifference standard announced in *DeShaney* and *Estelle* (Opinion, App. 11a-12a), the same cases that this Court discussed with approval in *Lewis* as establishing the standard for the duty owed to persons in police custody where there is ample time for deliberation. *Cf. Lewis*, 118 S. Ct. at 1718. In sum, the court in this case, in harmony with *Lewis*, recognized that the State has a constitutionally mandated duty to persons it has incapacitated, and that an officer will be liable for acts that reflect deliberate indifference toward the plight of the person thus held.

2. Petitioners Rely on Their Version of Events, Ignoring the Requirement on Summary Judgment that All Disputed Issues of Fact Must Be Construed in the Light Most Favorable to the Non-moving Party.

In their Questions Presented and in their argument, Petitioners assert that after arresting Davis, they released him "at another location" because the jail was overcrowded and Davis had said he would destroy more property at the scene where he was arrested. (Pet. i-ii, 3-5, 16-17.) Relying exclusively on their version of events, Petitioners argue that the court of appeals applied the wrong standard in determining that their conduct violated Davis' substantive due process rights. (Pet. 17.) However, Petitioners have ignored the conflict in the evidence regarding these events, for the record supports Davis' complaint that Petitioners took him into custody

and then dropped him off against his will on a dark, busy highway to "teach him a lesson." (*See* Opinion, App. 3a-4a, 7a.) Thus, Petitioners attempt to avoid their obligation, as the party seeking summary judgment, to show the absence of evidence supporting Davis' complaint. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Moreover, when the case is analyzed under the well-settled rule that the conflict in evidence must be viewed in the light most favorable to Davis, it is clear that Petitioners' Questions Presented do not fairly state the issues in this case, and that their statement of Reasons for Granting Certiorari is completely undermined. Fed. R. Civ. P. 56(c); *see United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Petitioners rely exclusively on their own depositions[2] in their attempt to manufacture "conflicting law enforcement objectives" and justify what they did to Davis. (Pet. 3-4, 16.) Ignoring Davis' testimony that Petitioners told him they were going to "teach him a lesson," and the circumstantial evidence against them, Petitioners recite as fact their contention that the real reason for their actions was Davis' threat to cause further harm at the location where he was apprehended, if the officers released him. (*Compare* Pet. 4-5, *with* Opinion, App. 7a.)

For purposes of summary judgment, however, the district court and the court of appeals were obliged to rule on Davis' assertion that Petitioners handcuffed him and drove him far from the jail, where they released him

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[2] In their Statement of Facts, Petitioners cite to the "Deposition of Shawn Davis (hereafter SM)." (Pet. 3.) However, it is evident that "SM" refers to the deposition of Petitioner Shawn Murphy. (*See* Pet. 3-4.)

from custody in order to "teach him a lesson"; the evidence that Davis was patently incapacitated when he was shoved from the police vehicle onto the highway; and the undisputed evidence that Petitioners chose a busy, dark, unfamiliar highway where the speed limit was 55 m.p.h. as the place to release Davis. (*See* Opinion, App. 3a-4a, 7a.) In sum, neither Petitioners' Questions Presented nor the balance of the Petition speaks to the actual issues this case presents. And, as this Brief shows, the court of appeals correctly applied the law to the actual issues and evidence.

3. The Court of Appeals' Ruling Does Not Conflict with the Holdings of Other Circuits.

Petitioners have attempted to construct a conflict between the Sixth Circuit opinion in this case and the Seventh Circuit holding in *Estate of Stevens*. (Pet. 26-28.) However, no such conflict exists, because *Estate of Stevens*, like *Lewis*, involved a plaintiff whose claim was based on a misapprehension of the State's duty toward persons who had not been arrested or otherwise taken into custody. *See Stevens*, 105 F.3d at 1172. Where a plaintiff is in custody, however, the approach of the Seventh Circuit is similar to and consistent with the Sixth Circuit court's opinion in this case. Indeed, in *Armstrong*, the Seventh Circuit recognized that *Lewis* "endorsed the use of the deliberately indifferent standard for cases in which the defendants have the luxury of forethought." 152 F.3d at 576.

The plaintiff in *Armstrong* was held for fifty-seven days in jail after voluntarily turning himself in in

response to a body warrant for unpaid child support. Despite his repeated inquiries about when he would get to court, jail personnel simply held Armstrong because his file had been misplaced. *Id.* at 568-69. Applying the deliberate indifference standard, the Seventh Circuit had no difficulty in holding that Armstrong's substantive due process rights were violated by the officials whose actions (and inactions) kept him incarcerated and without any means of obtaining a judicial hearing for nearly two months, in the face of his repeated protests. *Id.* at 580. The conduct of the defendants in *Armstrong* was not nearly as purposeful or conscience-shocking as that of Petitioners in this case, for there, the guards took no affirmative action to place the plaintiff in harm's way. Rather, they disregarded Armstrong's complaints and relied on their flawed system to provide notice of when Armstrong's court date would come up, exhibiting deliberate indifference which the court easily found conscience-shocking. *Id.* at 582. The analysis in *Armstrong* makes it clear that Petitioners in this case would find no safe haven if they were presenting their arguments to the Seventh Circuit; that court, like the Sixth Circuit, would unquestionably deny their summary judgment appeal.

Other circuits have also followed the approach taken by the Sixth and Seventh Circuits in evaluating the special relationship and concomitant duty established when the State takes an unwilling subject into custody. *See, e.g., Rogers v. City of Little Rock*, 152 F.3d 790 (8th Cir. 1998); *Baptiste v. J.C. Penney Co.*, 147 F.3d 1252 (10th Cir. 1998); *Santamorena*, 147 F.3d 1337.

4. GVR Is Not Called for in this Case.

Evidently aware that this case is not otherwise appropriate for certiorari, Petitioners assert that the case "would benefit substantially from reconsideration in light of *Lewis*." (Pet. 19.) However, a mere "substantial benefit" to a petitioner should not impel this Court to grant certiorari, vacate and remand (GVR), because "GVR power should be exercised sparingly." *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 173 (1996). It is true that 28 U.S.C. § 2106 appears on its face to confer on the Court a broad power to GVR: "The Supreme Court or any other court of appellate jurisdiction may . . . vacate . . . any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and . . . require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106 (1996). However, GVR is appropriate only where there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence*, 516 U.S. at 167.

Here, neither condition for GVR is met, for as shown above, the Sixth Circuit's decision on the facts before it is consistent with this Court's jurisprudence and with the approach taken by other circuits in similar cases. Moreover, the ultimate outcome of the litigation does not depend on this Court's GVR power at this time; the court of appeals' ruling only remands the case for trial. Petitioners will have ample opportunity to present their version of the case to a jury which will be appropriately

instructed in light of both *Lewis* and *DeShaney*. Any prejudicial errors committed at trial will be subject to correction on appeal.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 98-534

In The

Supreme Court of the United States

October Term, 1998

PATRICK BRADY and SHAWN MURPHY,

Petitioners,

v.

STEVERSON DAVIS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF THE MICHIGAN MUNICIPAL LEAGUE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The Defendants have filed a Petition for a Writ of Certiorari raising the three Questions repeated below.

Question #1: Whether the Fourteenth Amendment's Due Process Clause imposes upon city police officers who arrest a man for destruction of property belonging to a homeless shelter and then transport him to another location, a duty to protect that person from injury by third persons after the officers have released the man from custody, where the reason for releasing the man from custody at another location was that the county jail would not accept him because it was overcrowded, and the arrested person stated that if released at the jail he would return to the homeless shelter and destroy more of its property?

Question #2: Whether the Court Below erred when it evaluated the question whether a claim had been stated under 42 U.S.C. 1983 for violation of the Fourteenth Amendment's substantive Due Process guarantees using a "deliberate indifference" standard, rather than the "shocks the conscience" standard which this Court established in *County of Sacramento v. Lewis* [___ U.S. ___, 118 S. Ct. 1708, 140 L. Ed. 2d 1043] (May 28, 1998), where the claim is made against police officers who arrested an intoxicated man for property destruction and then released him on the side of a road because the jail was overcrowded and could not accept the man, and, where after the man's release, he was struck and injured by a car driven by a third person?

QUESTIONS PRESENTED – Continued

Question #3: [Note: Petitioner [has also] reserve[d] the right to argue Question 3 in the event certiorari is granted on the above questions, but does not include Question 3 among the reasons for the grant of certiorari.] Whether the courts below erred in denying police officers claims for qualified immunity in a case under 42 U.S.C. 1983 alleging a substantive Due Process violation, when the courts below held that in November 1994 police officers had a clearly established Constitutional obligation not to do anything to increase the danger of an intoxicated person to injury from third persons when they move him to another location to prevent the commission of a crime and release him from custody there?

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE MICHIGAN MUNICIPAL LEAGUE IN SUPPORT OF PETITIONERS

1. Your Amicus Curiae is the Michigan Municipal League and its Defense Fund. (Hereinafter: "the League" or "Municipal League.")[1] The Respondent's counsel, George Hamo, denied consent to permit the filing of this Amicus Brief, while the Petitioner's counsel granted consent to file the Brief. The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 512 Michigan cities and villages of which 380 of these municipalities are also members of the Michigan Municipal League Legal Defense Fund.

2. The Michigan Municipal League operates the Legal Defense Fund through a Board of Directors. The purpose of the Legal Defense Fund is to represent the member cities and villages in litigation of statewide significance. The Board of Directors of the League authorized the preparation and filing of this Amicus Curiae Brief in order to insure that the interests of municipalities in Michigan, and the citizens (and taxpayers) whom they represent, are heard and understood by this Court.

3. The Board of Directors is composed of the President and Executive Director of the Michigan Municipal

---

[1] Rule 37.6 Statement: This Brief was written entirely by counsel for amicus, as listed on the cover. No outside contributions were made to the preparation of or submission of the text of this Amicus Brief.

League, as well as the Officers and Directors of the Michigan Association of Municipal Attorneys. These members represent both large, medium size and smaller communities located across the state, including City Attorneys from the following jurisdictions in Michigan: Philips A. Balkema, City Attorney for the City of Grand Rapids; Williams B. Beach, City Attorney for the City of Rockwood; John E. Beras, City Attorney for the City of Southfield; Harold Deason, City Attorney for the City of Grosse Pointe Park; Catherine R. Ginster, City Attorney for the City of Saginaw; Andrew J. Mulder, City Attorney for the City of Holland; Debra A. Walling, corporation counsel for the City of Dearborn; Eric D. Williams, City Attorney for the City of Big Rapids; and William C. Mathewson, General Counsel for the Michigan Municipal League.

4. The Municipal League files this Brief in support of the Petitioners and wishes to assist this Court in seeing the importance of this case to all citizens living in the State of Michigan. Those municipalities directly involved in the events that are the subject of this suit are the City of Flint, Genesee Township and Genesee County. These three municipal entities all had some direct involvement in the facts and circumstances that led to the release of Mr. Davis on a roadside outside of Flint, Michigan. Mr. Davis was taken by the Defendants to the Genesee County jail whose officials refused to house him as an inmate pending criminal charges. After the Defendants released Mr. Davis from custody, he was found by Genesee Township Police Officer Carlson in the middle of the road. Carlson talked to Davis before Davis was hit by a car.

5. Each of these three municipal jurisdictions have a strong interest in the outcome of this litigation, even though no government entity has been named as a party defendant by the Plaintiff in this case. All municipalities in Michigan will have to bear the burdens imposed by the decision to prevent the potentially unlimited, and completely unwarranted, constitutional liability created by the Sixth Circuit's Opinion.

6. Your Amicus seeks to show to this Court that the actions of the City of Flint police officers, of the Genesee Township police officer and of the County Sheriff at the jail were designed to protect the public from the Plaintiff's threatening conduct. The record does not reveal any unconstitutional conduct in the actions of the defendant police officers in failing to prevent the Plaintiff from being released from custody as a homeless man who must sleep in a public park.

7. Your Amicus party believes that, if the decision of the Sixth Circuit is allowed to stand, then it will require that all intoxicated persons must be treated by police officers as incompetent, and entitled to be kept (against their will) in the county jail until they are sober. This is a dramatic expansion of the role of the police in protecting intoxicated persons from harms they may create due to their own decision to become drunk. The only way to avoid this new responsibility to detoxify intoxicated persons taken into custody will be not to arrest them in the first place.

8. The Amicus Brief will seek to show why the police in municipalities in the Sixth Circuit and around the country are not following the rule of law adopted by

the Sixth Circuit below. This rule requires all intoxicated persons to be put under arrest to be kept in continued detention and protective custody until they are sober. If this is a constitutional obligation of police departments in Michigan and across the Sixth Circuit, then the decision below will impose huge costs on all municipalities.

9. Moreover, it is likely that the threat of this new liability will cause police departments across the nation to stop answering the public demand for some protection against the types of street disorder that contribute to the high crime rates in many inner city neighborhoods – and that is preventable. In this way, the decision below will frustrate legitimate law enforcement efforts to manage street disorder and the efforts of communities to stop crime.

10. Your Amicus will seek to show in the Brief why vacating the opinion of the Court below will allow police officers across the nation to continue to pursue legitimate crime-fighting strategies made unlawful by the decision below. The police should be allowed to arrest, move and then release suspects who are intoxicated without creating a duty to protect them from harm by third parties after their release from custody. Such policies are being followed by many municipalities and they should not be declared unconstitutional. Under the Sixth Circuit decision police officers who arrest such persons will have to place them in already overcrowded county jails, or to raise large amounts of tax revenue to expand the size of county jails, or to build medical facilities (e.g., such as detoxification clinics in a hospital).

For the foregoing reasons, your Amicus requests leave to file its brief.

Respectfully submitted:

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STATEMENT OF REASONS FOR REVERSAL

The questions set forth in the Petition are stated on page i preceding the Motion. The Amicus Curiae will address the following reasons for reversal:

Legal Argument I: The Court Failed to Apply the "Shocks the Conscience" Standard from *County of Sacramento v. Lewis*, As Required, to Measure Whether the Police Officers Violated A Constitutional Duty Owed to Protect the Plaintiff from Harm After His Release from Custody.

Legal Argument II: The Court below Has Created a New, Unfunded Federal Mandate to Treat Intoxicated Suspects As Having a Constitutional Right to Continued Detention That Will Have Profound Budgetary Consequences, and This Mandate Invades the Sovereignty of the States.

Legal Argument III: The Sixth Circuit Court Decision Will Prevent Municipalities from Relying upon Police Officers to Engage In Legitimate Law Enforcement Efforts to Detain and Move Intoxicated Persons Engaged in Disorderly Conduct, While Choosing Not to Incarcerate Them in a Jail After Their Arrest.

Legal Argument IV: The Court below Did Not Properly Find That The Defendants Had No Qualified Immunity Because the Constitutional Duty Owed Was "Clearly Established" in 1994.

OPINION BELOW

The Sixth Circuit's opinion in *Davis v. Brady*, is published at 143 F.3d 1021 (6th Cir. May 8, 1998).

STATEMENT OF RELEVANT FACTS

This Court may review the facts in the Petition and Opinion in the Court below. The Petition discusses the relevant statutory and constitutional provisions, and the jurisdiction of this Court to hear this case.

PROCEDURAL POSTURE OF THE CASE

This case came to the Court of Appeals for the Sixth Circuit on an interlocutory appeal raising a qualified immunity defense. The District Court had denied the defendant police officer's motion for summary judgment. The Sixth Circuit's opinion reviewed what "the record can reasonably be read to show" about the Plaintiff's claim that whether "the defendant officers took the affirmative act of restraining Davis's freedom to act on his own behalf, and consequently imposed upon themselves a duty to ensure that they were not placing him in danger." (Appendix to Petition, App. 7a.) The Sixth Circuit affirmed the District Court's decision denying qualified immunity based upon the deliberate indifference standard as follows:

> In this case, the taking of Davis into custody triggered the defendant officers' duty to protect Davis [and] . . . the defendant officers violated this duty when they exhibited deliberate indifference to Davis's well-being by abandoning him, in his inebriated state, on an unfamiliar, dark, and busy highway. (Appendix, App. 12a-13a.)

The defendants could not discuss the holding of *County of Sacramento, et al. v. Lewis, et al.*, ___ U.S. ___, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (May 26, 1998) in their Petition for Rehearing En Banc on May 21, 1998, since this

Court issued its decision in *Lewis after* the Petition was due to be filed. F.R.A.P. 28(j) bars filing supplemental briefs after an opinion has been issued by the Circuit and after the petition for rehearing has been filed. However, there is no reason why the Sixth Circuit should have ignored the holding of *Lewis*. The entire Sixth Circuit was reconsidering its Opinion in this case for an entire month after this Court issued its decision in *Lewis* on May 26, 1998. After giving the issues consideration on the Petition for Rehearing, the Sixth Circuit issued an order denying the rehearing motion on June 29, 1998. (Appendix, App. 23a.) Even in its order denying rehearing, the Sixth Circuit did not consider the new legal standard announced in *Lewis*.

Accordingly, the Petitioners filed their Petition seeking to have this Court grant certiorari and to vacate the published opinion of the Sixth Circuit because it conflicts directly with published decisions of this Court, including *Lewis, supra* and *DeShaney v. Winnebago Soc. Service,* 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989). Your Amicus Curiae file this Brief in support of the Petition for a Writ of Certiorari.

STATEMENT OF REASONS FOR REVERSAL

***Legal Argument I*: The Court Failed to Apply the "Shocks the Conscience" Standard from *County of Sacramento v. Lewis*, As Required, to Measure Whether the Police Officers Violated A Constitutional Duty Owed to Protect the Plaintiff from Harm After His Release from Custody.**

The Sixth Circuit Court applied a legal standard fundamentally at odds with the holding of *County of Sacramento, et al. v. Lewis, et al.*, ___ U.S. ___, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (May 26, 1998), ***before*** the Sixth Circuit denied the pending motion for rehearing in this case. Accordingly, there can be no dispute that the Sixth Circuit had a duty to apply that standard here before it denied the defendants' petition for rehearing. Instead of doing

so, the Sixth Circuit Court disregarded this Court's decision in *Lewis*, and never took into account any of the legitimate law enforcement objectives pursued by the defendant police officers in this case in deciding if they owed a duty to hold Davis in continued custody.

In *Lewis*, this Court held that the conduct of police officers in failing to protect a person from harm by third parties must be "arbitrary in a constitutional sense." To decide if it is a constitutional violation, *Lewis* teaches that the police officer's conduct must be measured in light of "any substantial countervailing interest [that might] excuse the State from making provision for the decent care and protection of those it locks up . . . ", and from preventing the suspect upon release from custody from coming "into harm's way." *Lewis*, ___ U.S. ___, 140 L. Ed. 2d 1045, 1061. Further, the *Lewis* decision states that, when there are substantial countervailing law enforcement or other interests served by releasing the suspect from custody, mere deliberate indifference by the police officers to the needs or safety interests of the suspect are not enough to show that a constitutional duty is owed to protect the suspect from harm. *Id.*

The Sixth Circuit failed to take into account in its opinion the legitimate law enforcement objectives that the defendant police officers pursued by releasing Mr. Davis far from the county jail and the nearby homeless shelter. Mr. Davis made it clear to both of the defendants that it was his stated goal to return to the shelter and break out the rest of the windows of the building. As the Petition states,

> When Officer Murphy went to retrieve Mr. Davis from the county jail holding cell, he asked Davis where he wanted to go. Davis replied, ***"Take me back to the mission and I'll break out the rest of the windows." SM, at 80, 86.*** . . . The officers drove Davis away from the area of the mission and left him off at the lighted entrance to Bluebell Beach, a public park. Petition for Certiorari at 5. (Emphasis added)

The defendant police officers thwarted the stated intent of the Plaintiff to continue his criminal conduct by taking him far enough away from that area to prevent further crime. Inexplicably, the Sixth Circuit Opinion fails to take into account the fact that the defendants were pursuing legitimate law enforcement objectives by releasing him some distance from the shelter. The Sixth Circuit faulted the defendant police officers for releasing Mr. Davis in Genesee Township, rather than at the jail:

> "In the present case, Davis alleges – and the record can reasonably be read to show – that after taking Davis into custody, the defendant officers dropped Davis off on a dark, busy highway and left him there ***against his will***. In so doing, the defendant officers took the affirmative act of restraining Davis' freedom to act on his own behalf, and consequently imposed upon themselves a duty to ensure that they were not placing him in danger." (Sixth Circuit Opinion, Appendix to Petition, App. 7a.)

The Sixth Circuit then disregarded the fact that the police officers exercised discretion to remove Mr. Davis from the area near the homeless shelter. Instead, the panel decision makes a finding that the police officers had no right to "interfere" with the stated intent of Mr. Davis to return to the shelter upon his release. The decision states: "the defendant officers in this case placed Davis in a more dangerous situation than he was in prior to their ***interference***, when they drove him outside the Flint city limits and abandoned him on a dark and dangerous highway in an unfamiliar area." (Sixth Circuit Opinion, Appendix, App. 9a.) (Emphasis added.) This conclusion cannot be supported under this Court's decision in *Lewis, supra* or *DeShaney, supra*.

The police have a right to stop a criminal from engaging in continued acts of destroying property. It should shock this Court's sensibility that the Court below would treat an action by two police officers to prevent a homeless shelter from having its windows broken out as an

interference of the vandal's civil rights. Then the Sixth Circuit concluded that the Fourteenth Amendment Due Process Clause imposes a duty on the defendants to protect Davis *only because of the fact that he was placed on the road against his will.*

The record simply does not support the conclusion that Davis wished to be kept in custody or to be released in any other particular place. It is undisputed that Davis only asked to go to the shelter to continue breaking out windows. The police had a legal duty to thwart this wish by him. Davis did demand that he be released from custody from the moment of his initial arrest. This is a typical situation where the police must manage the unruly and often violent behavior of an intoxicated suspect who wishes to be free and is uncooperative during his entire detention.

The Court analyzed the police officers' duties to hold Mr. Davis, rather than release him, under a "deliberate indifference" standard. By applying the "deliberate indifference" standard, the Court applied the wrong legal standard. The Sixth Circuit is again on the wrong side of a split in the Circuits, as this Court explained in *Lewis*, ___ U.S. ___, 140 L. Ed. 2d at 1061.

The new constitutional duty created by the Sixth Circuit conflicts with the decisions of this Court protecting the rights of persons being held involuntarily under a suspicion they are mentally incompetent or a danger to themselves. See generally, Michael L. Perlin, *Mental Disability Law: Civil and Criminal* (Lexis Law Pub. 1998) Vol. I at 44-188, 417-522. When the police or any state officials seek to involuntarily commit a person against their will for medical, psychological or drug treatment, this Court has consistently warned that the person enjoys a presumptive right to be set free that the officials must overcome by a preponderance of evidence showing incapacity. This Court has always said that, when the person who is involuntarily committed by a state official seeking to protect the suspect from himself, the courts must view the evidence supporting such detention by

erring on the side of releasing the suspect. See *Youngberg v. Romeo*, 457 U.S. 307 (1982); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); and, *Humphrey v. Cady*, 405 U.S. 504, 509 (1972). The police only have a duty under the decisions of this Court to restrain a mentally ill or intoxicated person, and involuntarily committing them to jail or to a hospital, to a drug treatment center or to a mental facility, when it would be obvious to anyone that the person is a danger to himself. *Id.*

The defendant police officers conformed their conduct to the holdings of these cases. They had a duty under this case law to use the least restrictive alternative form of incarceration of a person who is intoxicated or mentally ill and arrested on the street. The defendants honored Mr. Davis's wish to be freed from custody after they had decided not to hold him in jail pending any criminal charges. They were correct to do so because the evidence does not ***clearly*** show he is intoxicated and incompetent.

The Court has reversed the normal presumption that the police must err on the side of releasing a suspect who is intoxicated with only a diminished capacity who is not being held for any crime. This court should reject the equation made by the Sixth Circuit that simply because one is drunk then one is incompetent and unable to care for oneself. (Sixth Circuit Opinion, Appendix, App. 12a.) ("[The defendant officers] knew, or reasonably should have known, that Davis was drunk and unable to care for himself.") This conflicts with the decision of the Seventh Circuit in *Estate of Scott B. Stevens v. City of Green Bay*, 105 F.3d 1169 (7th Cir. 1997), holding that police officers are not charged with the knowledge of how much alcohol a suspect has consumed. Police officers on the street have no way to measure a suspect's blood alcohol level in most cases.

The Sixth Circuit has made the police responsible to protect Mr. Davis from himself and the dangers he created by becoming intoxicated while homeless, as well as to protect him from third parties. To impose such a broad

duty is no less than making the police officers the insurer of the safety of the suspect. This is contrary to the express holding of both *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992) (holding that municipalities do not have a duty to become insurers of the safety of municipal employees from safety risks in the workplace under the Fourteenth Amendment).

The Sixth Circuit opinion is also plainly contrary to this Court's holding in *DeShaney v. Winnebago Soc. Serv.*, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989). The basic argument of *DeShaney* applies to this situation, namely, that simply because state officials create a relationship to a foster child does not make them forever responsible to provide care to that child. In this case, Mr. Davis expressed a wish to terminate the custody relationship. In granting his wish to be released, the police had no choice but to take Davis away from the shelter where he would have returned to break the windows. To apply a duty to protect Davis is more unworkable for temporary detention situations. The holding in *DeShaney* was that there was no duty to protect the child from harms he faced before the much longer detention of foster commenced. The same holding applies here. Davis faced the same general harms that a homeless person faces who has no shelter and is intoxicated by his own acts on the street. Davis faced these dangers before his arrest and would have faced them without police intervention. This is why Joshua DeShaney was harmed: his father who had beaten him before the police intervened abused him after he was returned to his father.

DeShaney forecloses the idea that once there is a special relationship created, you cannot end it. Ending the special relationship in *DeShaney* did not create a breach of constitutional duty where the child was released to the old dangers, and it should not lead to a breach of duty here.

The Court below has held the police officers accountable and potentially liable for leaving a suspect on the road when another police officer from a different police

agency did not believe Davis was a danger to himself. The Court also held the police officers accountable for the failure of the driver of the automobile to stop in time when she had a last clear chance to do so. However, neither the other police officer nor the driver of the car that hit Mr. Davis proximately caused the injuries that Mr. Davis now suffers. He caused his own injuries by walking into the street. The Third Circuit held in *Kneipp v. Tedder and City of Philadelphia*, 95 F.3d 1199 (3d Cir. 1996), that police officers may be held constitutionally liable under Section 1983 for abandoning an intoxicated suspect released from custody near a roadside only when three conditions are met: (1) the suspect could not be released because she was physically incapacitated due to extreme intoxication, (2) the police officers have an obvious safe place to take the suspect and refuse to do so, and (3) the police officers interfere with a person who is trying to take the intoxicated suspect being arrested to a position of safety from harm. See *Kneipp, supra*.[2] In this case, none of these three conditions are met.

The record in this case only suggests that the Plaintiff was somewhat impaired due to his intoxication. This impaired condition is familiar to many people who become drunk but are not incapacitated. The police should not forcibly take such a person into custody and hold them against their will, as the Sixth Circuit decision requires. In this case, the Plaintiff was able to walk and able to stand and able to talk after the defendant police officers released him at a county park on Bray Road.

This is not a case where the Plaintiff was so clearly incapacitated when the police released him from custody that he could be considered to be medically or physically

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[2] In *Kneipp*, the police arrested an intoxicated woman, Samantha Kneipp, just one block from her home when her husband was taking her home from the bar. The police also interfered with the wife's source of rescue (i.e her husband) by leading him to believe that she had been taken to jail.

incapacitated. For instance, it is undisputed that the Plaintiff walked from the location of his release to the front lawn of a house to talk to a resident. Davis stood and talked to Genesee Township Officer Carlson before he was hit. Davis then walked into the road waving for a ride *both before Officer Carlson arrived and after he left*.

Given these facts, the Court below should have addressed whether a reasonable police officer could make a mistake of fact as to whether the Plaintiff was so intoxicated as to be a danger to himself *in any location*.

***Legal Argument II*: The Court below Has Created a New, Unfunded Federal Mandate to Treat Intoxicated Suspects As Having a Constitutional Right to Continued Detention That Will Have Profound Budgetary Consequences, and This Mandate Invades the Sovereignty of the States.**

In its Opinion, the Court below has overlooked the fact that Davis was released because the Genesee County jail was overcrowded. The Court also overlooked in the Opinion the undisputed fact that the Plaintiff lives on the street when he is not in the shelter and, thus, he had to be released there by the defendant police officers. The Opinion below does not even mention the word "homeless" or "homeless shelter." The Court below simply asserted that the defendant police officers acted "against the Plaintiff's will" by forcing him to be released from custody on the roadside.

The Court's Opinion should have considered the three basic facts that justified the defendants' conduct in releasing Davis on Bray Road: (1) first, Davis could not be put in the county jail because it was overcrowded, and there were no alternative facilities available to take him for medical treatment or to be kept against his will in protective custody other than this jail, (2) second, Davis said that he wanted to be released from custody, rather than being held against his will at the jail, and (3) third, Davis was homeless.

These facts show why the defendants acted upon the basis of "legitimate law enforcement objectives" that this Court in *Lewis* saw to be a necessary part of the analysis of whether police officers violated a constitutional duty by conduct that "shocks the conscience." The "shocks the conscience" standard had been followed by every other Circuit before *Lewis*, except the Sixth and Ninth Circuits. *Lewis, supra.* Instead of applying the "shocks the conscience" standard, in *Lewis* and Circuit decisions before *Lewis*, the Sixth Circuit employed a result-oriented analysis and followed a deliberate indifference standard. Only by applying the wrong legal standard could the Sixth Circuit arrive at the conclusion that the defendants owed Mr. Davis a constitutional right to confinement based upon his intoxication, after his initial detention. The Court below should have found that Mr. Davis's right to be held in protective custody ended after the police decided not to hold him for any criminal offense, and after they determined that he should be released from custody at a time when he was not clearly incapacitated.

The federal courts should not be mandating every local political subdivision in America (or in the Sixth Circuit) to provide this type of social services to only intoxicated persons who have committed crimes, thereby diverting resources from foster care programs, drug treatment, food stamps, medical care for the poor, etc. This Court has explained why federal courts should not directly or indirectly override the budgetary decisions of sovereign states, and their subdivisions, by imposing directly duties under the Fourteenth Amendment or other constitutional provisions, contrary to basic notions of federalism. See *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) (invalidating Gun-Free School Zones Act of 1990 as exceeding Congress' power under the Commerce Clause).[3]

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[3] See generally, Malcolm Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts*

The State of Michigan and its municipalities also have pursued legitimate law enforcement objectives in seeking to protect Davis from the harms he would face in an overcrowded Genesee County jail. This lawsuit arose because the Genesee County Sheriff concluded that Davis should not be admitted as an inmate because the county jail was overcrowded. This is a very common situation in county jails in municipalities across the county. The population of local county jails (where most inmates are held for petty crimes) has increased in size three-fold in just twenty five years – and there is no end in sight to the constantly increasing numbers of inmates that police bring to the doors of these jails. Wayne Walsh explains the magnitude of the problem in his study *Counties and Court: Jail Overcrowding and Court Ordered Reform*, as follows:

> Chronic Overcrowding in the nation's city and counties [the 1993 Senate Crime Bill]. Even if new prisons were to fractionally reduce overcrowding, the 20th Century has taught us two lessons well: New prisons fill up almost as soon as they open, and there are always several offenders standing in line to take the place of each one who is temporarily removed from the streets.
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> * * *
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> * * * * Jails in the United States have been overcrowded and characterized by poor living conditions virtually since their inception. Recent massive increases in jail populations (from 158,394 in 1978 to 444,584 in 1992) have only magnified such longstanding problems * * * * Wayne Walsh, *Counties and Court: Jail Overcrowding and Court Ordered Reform* (Temple University Press, Philadelphia 1995) at 5-7.

The Sixth Circuit did not consider the impact of vesting the Plaintiff with a new constitutional right to be

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Reformed America's Prisons (Cambridge University Press 1998), Chap. 5, 149-203.

held in custody in local county jails. These jails are run by local municipal governments and they are chronically overcrowded already.

The Michigan Legislature has sought to stem the tide of constantly increasing jail populations by mandating that county governments control the size of the jail population. See County Jail Overcrowding Emergency Powers Act, M.C.L. 801.51 et seq., M.S.A. 28.1758(1) et seq. The Michigan Supreme Court upheld the power of the legislature to pass this statute in an effort to avoid liability for municipal governments:

> [T]he Legislature has an interest in helping the state and its employees avoid liability when possible [and] . . . past experience has shown that conditions arising from jail and prison overcrowding can lead to suits against jail and prison officials brought by prisoners under 42 U.S. Sec. 1983 for violation of their civil rights. * * * * The Legislature, through the jail overcrowding act, is seeking to **prevent** violations of prisoners' Eighth and Fourteenth Amendment rights. When we consider that many of the prisoners in county jails have yet to be convicted, the state must be solicitous of their rights while they are still protected by the presumption of innocence. The act provides bright-line guidance to the courts and sheriff when the likelihood of Eighth and Fourteenth Amendment violations become imminent. . . . A threatened injury is enough to justify action." See *Kent County Prosecutor*, 428 Mich. 314, 326, n.12, 409 N.W.2d 202, 208, n.12 (1987).

The Supreme Court of Michigan also pointed out that the Jail Overcrowding Act was passed to comply with decisions of this Court. In its Opinion in the *Kent County Prosecutor*, the Court observed how this Court had "highlighted the horrendous environments which overcrowded [jail] conditions create" by quoting from Justice Brennan's opinion in *Rhodes v. Chapman*, 452 U.S. 337, 354, n.3, 101 S. Ct. 2392, 2403, n.3, 69 L. Ed. 2d 59 (1981). *Id.* at n.7. To

avoid these unconstitutional conditions of confinement, the Michigan Jail Overcrowding Act mandates catastrophic measures to be taken when the county sheriff fails to control the admissions to the jail.

The Genesee County Sheriff was following the general mandate of the Jail Overcrowding Act when his deputies decided in this case not to accept the Plaintiff for admission to jail. See *Muskegon County Commissioners v. Circuit Judge*, 188 Mich. App. 270, 469 N.W.2d 441, 445 (1991) (approving of use of practice of "deter[ring] acceptance of new prisoners, with certain exceptions" as a remedy for jail overcrowding.) The Defendants in this case were not free to disregard the decision made by the Genesee County Sheriff's Deputies refusing to hold the Plaintiff in custody.

The record does not reveal that Mr. Davis wanted to stay at the Genesee County jail for his own protection. The Sixth Circuit also cannot support the conclusion that its action of leaving Davis at the entrance to a public park had the effect of "restraining Davis's freedom to act on his own behalf." (Sixth Circuit Opinion, Appendix, App. 7a.) The record contradicts this finding, as does any common sense understanding of Mr. Davis's conduct in walking around the area around the entrance of the public park after these defendant police officers released him.

***Legal Argument III*: The Sixth Circuit Court Decision Will Prevent Municipalities from Relying upon Police Officers to Engage In Legitimate Law Enforcement Efforts to Detain and Move Intoxicated Persons Engaged in Disorderly Conduct, While Choosing Not to Incarcerate Them in a Jail After Their Arrest.**

The opinion of the Court below promises guaranteed liability for police officers honestly pursuing their "instincts to fight crime", and it promises social disorder for communities asking the police to take control of public spaces. When a citizen calls 911 to complain about an intoxicated person who is menacing them on the street, the police will have only one of two choices. First, the

police could decide not to arrest the intoxicated person. **Second**, the police can arrest a person and then release him after the Sheriff who runs the county jail or the county prosecutor makes the decision not to hold him in continued detention at the jail, or not to charge him with any crime.

Given the logic of the Sixth Circuit decision, the police can be expected to make a decision not to arrest intoxicated suspects if there is no place at the jail to hold them until they are no longer in their intoxicated condition. Once the suspect is arrested, or detained or moved to another location, then the Sixth Circuit decision requires that the police face possible liability for any harms arising after the release of the suspect that could have been avoided by continued detention.

The law of unintended consequences will apply here to create an effect of imposing liability that the Court below did not anticipate. The police will not provide protection to the community as they once did by removing intoxicated persons who are threatening others, at least not where there is no room at the jail to hold that person in custody. The decision of the police not to arrest intoxicated persons who are disturbing the peace will lead to social deterioration. George L. Kellig and Catherine M. Colis have described in *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* (Free Press 1996), how the New York City, Baltimore, Seattle, and San Francisco police departments have sought to halt street disorder as part of a community-wide strategy to reclaim poor and gentrified inner city neighborhoods.[4] As Kellig and Colis document, police departments in each of these cities have been following a

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[4] The former New York City Police Commissioner (America's "top cop") tells a similar story about his successful strategy to stop street disorder and subway crime as the key to reducing crime throughout the City. See William Bratton with Peter Knobler, *Turnaround: How America's Top Cop Reversed the Crime Epidemic* (Random House 1998).

conscious policy of seeking to stop street disorder in public spaces. They are doing so because residents, office workers, persons using a public park, riders on the subway or on city buses, and customers in stores or restaurants in inner city areas have demanded police intervention. See George Kellig and Catherine Colis, *Fixing Broken Windows, supra* at 15.

When the county jail is overcrowded, the police have nowhere to take these persons who they have arrested, detained and need to release. Under the Sixth Circuit decision in this case, the police will be held subject to suit and to being held liable under Section 1983 for performing what this Court should agree are legitimate law enforcement objectives, as defined in *Lewis*, of controlling street disorder so as to reclaim our inner cities for the majority of their citizens.

Legal Argument IV: **The Court below Did Not Properly Find That The Defendants Had No Qualified Immunity Because the Constitutional Duty Owed Was "Clearly Established" in 1994.**

The Sixth Circuit decision below recognizes that these two police officers owed a "clearly established" duty that no other Circuit opinion had recognized as of the time of the incident in November of 1994. This new constitutional duty conflicts with the law in every other Circuit. There is no other federal appellate court that has directly considered the question and held that police officers have a broad duty to protect an intoxicated person from harms created by third parties at the location where the suspect is released from custody. The only other Circuit to have specifically addressed the issue in a case involving an intoxicated person refused to hold that the police had a duty to protect the suspect after his release from the harms he caused to himself (i.e., by becoming intoxicated and then walking into the road where he was hit by a car). As the Petition points out, the Seventh Circuit explicitly refused to adopt this view in

Estate of Scott B. Stevens v. City of Green Bay, 105 F.3d 1169 (7th Cir. 1997).

The Congress adopted the laws that became the Civil Rights Act of 1871 (including 42 U.S.C. § 1983) in order to require the officials of the several states to respect the rights of persons in their jurisdictions to the protection of the U.S. Constitution and the laws.

To accomplish these statutory objectives, this Court has created an easily defined standard of when qualified immunity must be applied to bar a suit against a police officer. In *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982), this Court defined that standard by stating that because "an official [cannot] reasonably be expected to anticipate subsequent legal developments, nor [can] he fairly be said to 'know' that the law forb[ids] conduct not previously identified as unlawful, [such that] reasonable knowledge of the law involves knowledge only of legal rules that were 'clearly established' at the time of the conduct at issue." *Harlow*, 457 U.S. at 818. This Court later decided in *Anderson v. Creighton*, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987), that the question of whether a new constitutional right is "clearly established" may depend upon the level of generality at which the right is defined. The *Anderson* Court held that "the contours of the right [must be] sufficiently clear that a reasonable official would [have] understood that what he [was] doing violated that right." Both *Harlow* and *Anderson* held that a police officer must be given qualified immunity if, judging by an objective standard, a reasonable person would say that the constitutional right the official is accused of violating had not become "clearly established" at the time of the conduct.

The Sixth Circuit did not follow *Harlow* and *Anderson* since it held that the police officers owed a "clearly established" constitutional duty to the Plaintiff that no Circuit decision had recognized. There is no panel decision in the Sixth Circuit decided as of November of 1994

that clearly recognized that police officers owe a substantive due process duty to protect a suspect from harm upon release from custody. The Sixth Circuit did cite to four decisions in support of the view that this constitutional right not to be released had become "clearly established" in the Circuit. Those decisions are cited in the Sixth Circuit Opinion, *see* Petitioner's App. 6a-10a, citing *Walton v. City of Southfield*, 995 F.2d 1331, 1337 (6th Cir. 1993); *Gazette v. City of Pontiac*, 41 F.3d 1061, 1065 (6th Cir. 1994); *Foy v. Berea*, 58 F.3d 227 (6th Cir. 1995); and *Stemler v. City of Florence*, 126 F.3d 856, 867-868 (6th Cir. 1997). Three of these four decisions, including the *Gazette* decision decided in December of 1994, were published by the Sixth Circuit before the defendant police officers arrested and released Davis on November 17, 1994.

The above decisions in the Sixth Circuit do not create a "clearly established" constitutional right to protective custody or continued confinement owed by a police officer who arrests an intoxicated person. This is true under any analysis of whether the right was "clearly established" following this Court's definition of that standard in *Anderson* and *Harlow*.

There was no "clearly established" right at the time of the incident in November of 1994. The only decision on this issue that was published before the incident was *Walton*, 995 F.2d 1331, raised the issue of whether police officers violated a constitutional right owed a duty under the substantive due process doctrine to protect children from being abandoned in a car on the highway when they arrested the children's mother after a traffic stop. The *Walton* Court held that the conduct of the police officers was not clearly unlawful based upon any published decision of the Sixth Circuit in 1993, and so the Court granted them qualified immunity. Specifically, the *Walton* Court held that "the defendant officers maintain that the district court erred in denying qualified immunity to them on the claim that they abandoned the children [and] [w]e agree and reverse the district court on that issue." *Id.* at 1336, 1344.

Finally, the Sixth Circuit decision in *Walton* did recognize that this Court in *DeShaney* had held that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals," *id.* at 1336, quoting from *DeShaney*, 489 U.S. at 198, 109 S. Ct. at 1004. However, the *Walton* Court specifically declined to reach any decision about whether the police officers had violated a clearly established constitutional right owed by them to the children they abandoned on the highway after arresting their mother. The Sixth Circuit's *Walton* decision did review the decisions in the Seventh, Ninth, Tenth and Eleventh Circuits on the question of whether police officers have a "clearly established" duty to protect the personal security of suspects after their release from custody from harms created by third parties. *Walton*, 995 F.2d at 1337-1339 (collecting cases). But the Sixth Circuit concluded from this discussion that the decisions were either distinguishable on their facts or that "[these] Circuit decisions merely show that the circuits continue to be divided on the issue." *Id.* at 1339.

Obviously, the Sixth Circuit cannot rely upon *Walton* to conclude that there was a Circuit decision which "clearly established" the right of the Plaintiff to be placed in protective custody, rather than to be released on the roadside, after his arrest at the shelter. As a result, this case nicely frames an important and basic procedural issue that this Court should resolve. The question is whether a right is "clearly established" only after there is a published Circuit Court decision. Your Amicus asks this Court to use this case to hold that constitutional due process principles and fundamental unfairness are violated if these police officers are held to a standard of conduct that was not clearly established in any decision in the Circuit at the time of their conduct.

Officials should be able to know in advance when their conduct is likely to violate the Constitution or laws. Such advance warning of potential liability is not possible under a rule of liability that turns on whether the location

where an arrested person is released from custody is deemed, after the fact, to be more dangerous in some respect from the place where the person was arrested. The standard of liability created by the Sixth Circuit imposes a general duty to avoid negligence that will cause officials to be judged for their conduct by after-the-fact and wildly fluctuating standards. As this Court has recognized in *Lewis* in stating that Section 1983 was not intended to be a "font of tort law," the application of the negligence standard will catch both the most conscientious officer as the most deliberately indifferent. Such a new standard must be applied prospectively only to future cases. It is fundamentally unfair to impose liability on a state official for failing to predict future developments in the law.

CONCLUSION AND REQUEST FOR RELIEF

Your Amicus asks that this Court reverse the decision to protect the sovereign right of municipalities to make these decisions free from federal interference so as to be able to fund more worthy social programs better designed to promote the welfare of all citizens. Your Amicus also requests relief to prevent the Sixth Circuit from limiting the ability of police officers to prevent disorder in the streets of our cities, in the transit systems and in public spaces. For the foregoing reasons, this Court should vacate the decision of the Court below, grant certiorari, and then remand to that Court to issue a decision in light of this Court's recent decisions in *County of Sacramento v. Lewis, supra,* or decide the case on the merits.

Respectfully submitted,

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(5)

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No. 98-534

In The

Supreme Court of the United States

October Term, 1998

PATRICK BRADY and SHAWN MURPHY,

Petitioners,

v.

STEVERSON DAVIS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

OBJECTION TO MOTIONS TO FILE AMICUS CURIAE BRIEFS

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OBJECTION TO MOTIONS TO FILE AMICUS CURIAE BRIEFS

The Michigan Municipal League ("MML") and the Michigan Municipal Risk Management Authority ("MMRM") have filed motions for leave to file amicus curiae briefs in support of the Petition for a writ of certiorari. Respondent Steverson Davis did not consent to the filing of such briefs, and objects to the motions, because MML and MMRM argue their positions using facts contrary to the facts of this case and seek to present hypothetical issues to this Court which are not fairly presented by the facts. Accordingly, the motions of MML and MMRM to file amicus briefs should be denied. *See* Sup. Ct. R. 37.5.

MML and MMRM have simply ignored both the facts and the holding announced by the court of appeals in this case, for it is clear that Petitioners' duty to Davis is predicated on actions they took while they had Davis in custody. (*See* Opinion, App. 3a-4a, 7a.) Significantly, neither motion cites facts or discussions of law in the circuit court opinion which remotely suggest that this case actually involves the issues, facts or rules of law that are discussed in the MML and MMRM submissions.

The motions of MML and MMRM are based on the erroneous supposition that this case involves duties of police officers to "intoxicated, homeless individuals *after* they are released from police custody to their own personal recognizance." (MMRM Motion at 1; *see* MML Motion at i.) The MML Motion goes even further, with the wildly unsupported claim that the Court of Appeals opinion "requires all intoxicated persons to be put under

arrest to be kept in continued detention and protective custody until they are sober." (MML Motion at 4.) Both proposed briefs simply ignore the fact that Petitioners greatly increased the danger to Davis, by taking him in handcuffs to a dark, busy highway outside the city limits to " 'teach him a lesson,' " where they deposited him against his will even though they knew he was helpless. (Compare Opinion, App. 7a with MMRM Prop.Br. 6.)

This Court's Rule 37.1 states that amicus briefs are of "considerable help," if they bring "*relevant* matter to the attention of the Court that has not already been brought to its attention by the parties." (Emphasis added.) But the motions of MML and MMRM seek to present a case to this Court that is entirely different from the one actually at bar. Contrary to the statements in the Motions MML and MMRM have filed, this case does not establish a new rule imposing duties upon police officers that arise *after* a suspect is released from custody. Instead, the court of appeals relied on well settled precedent for its unremarkable holding that officers who have a suspect in custody must refrain from acting with deliberate indifference to the dangers they impose upon the arrestee. *See DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989); *see also Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (Eighth Amendment requires the State to provide adequate medical care to incarcerated prisoners); *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) (substantive due process requires the State to provide involuntarily committed mental patients services necessary to ensure their "reasonable safety" from themselves and others.); *City of Revere*, 463 U.S. at 244 (Due Process Clause requires the

responsible government or governmental agency to provide medical care to suspects in police custody who have been injured while being apprehended by the police).

This case is not about decisions that officers must make before they decide to arrest, nor does it concern discretionary actions officers may take when a jail is overcrowded. (*See* MMRM Prop. Br. at 6-7; MML Prop. Br. at 14-15; cf. Opinion, App. 7a, 10a-11a.) Thus, the Motions do not raise relevant matters with their parade of horribles based on the supposed dilemma facing police officers who must make decisions in "potentially dangerous situations." (MMRM Prop. Br. at 6-8; MML Prop. Br. at 16-17). Instead, as the court of appeals held, this case turns on the narrow issue of an officer's duty to refrain from placing a custodial suspect in harm's way, and then purposefully leaving him there with deliberate indifference to his plight. (Opinion, App. 10a – 12a.)

It is possible that MML and MMRM were misled by the erroneous Questions Presented and argument in the Petition, for although they seek review of the denial of their summary judgment motions, Petitioners have based their entire submission before this Court on their version of the case. It is Petitioners' contention that after arresting Davis, they released him "at another location" because the jail was overcrowded and Davis had said he would destroy more property at the scene where he was arrested. (*See* Pet. i-ii, 3-5, 16-17.) The motions of MML and MMRM rely on these contentions as well. (*See* MML Prop. Br. at 4-5, 7-8, 9, 10-11, 14-15; MMRM Prop. Br. at 4-5, 7-8, 10-11, 12-13, 15-16.) But the arguments based on these suppositions are simply irrelevant here, for as the court of appeals pointed out, the record supports Davis's

complaint that after Petitioners took him into custody, they drove him against his will to a dark, busy highway outside the city limits, where they removed his handcuffs and released him to "teach him a lesson," although they knew he was so intoxicated that he could not stand up. (Opinion, App. 3a-4a, 7a.) Fed. R. Civ. P. 56(c) requires that the facts be viewed in the light most favorable to Davis, the non-moving party in the summary judgment proceedings. (*See* Opinion at 7a, 10a.; *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).) Thus, the facts in the case before this Court are wholly inconsistent with the recitations in the Motions and proposed briefs of MML and MMRM.

CONCLUSION

For the reasons stated above and in the Brief in Opposition, the Motions of MML and MMRM to file briefs as amicus curiae are not well taken and should be denied.

Respectfully submitted.

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